No. 87-1226

In The
# Supreme Court of the United States
October Term, 1987

RALPH KEMP, WARDEN,
*Petitioner,*

v.

CHARLIE BENSON BOWEN,
*Respondent.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I.

Whether the States have the right to rely on the finality of judgments in death penalty cases?

II.

Whether, in a case where a defendant pleads insanity and the talismanic language of *Francis v. Franklin,* — U.S. —, 105 S.Ct. 1965 (1985), is charged, the harmless error rule of *Rose v. Clark,* 478 U.S. —, 106 S.Ct. 3101 (1986), is inapplicable as a matter of law?

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ralph Kemp, respectfully prays that the writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on October 22, 1987.

## OPINIONS BELOW

The opinion of the United States district court for the Middle District of Georgia granting federal habeas corpus relief to Respondent was entered on March 16, 1984. (Appendix A). The Eleventh Circuit affirmed the judgment of the district court in part, reversed the judg-

ment in part and remanded the case on August 6, 1985, in *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985). (Appendix B). Petitioner's petition for rehearing and suggestion for rehearing *en banc* was denied by the Eleventh Circuit on December 2, 1985. (Appendix C). The judgment of the Eleventh Circuit was issued as the mandate on July 11, 1986. (Appendix D). On January 28, 1987, the Eleventh Circuit on "sua sponte reconsideration" ordered that the mandate be recalled and that the case be reheard *en banc*. (Appendix E). On February 10, 1987, Petitioner filed a motion to reissue the mandate in this matter. (Appendix F). On May 11, 1987, the Eleventh Circuit ordered that the motion to reissue the mandate be carried with the case. (Appendix G). On October 22, 1987, the Eleventh Circuit affirmed the granting of federal habeas corpus relief to Respondent. (Appendix H).

## JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on October 22, 1987. (Appendix H). The motion for the stay of the mandate was granted until January 20, 1987, in connection with this matter.

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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## STATEMENT OF THE CASE

On August 22, 1977, the Polk County, Georgia Grand Jury indicted Respondent for the rape and murder of Sheila Denise Young. Following a jury trial, Respondent was convicted on charges of both rape and murder. Respondent was sentenced to life imprisonment on the rape charge and received the death penalty based on the murder conviction. Respondent filed his direct appeal from his convictions and sentences to the Supreme Court of Georgia. The Supreme Court of Georgia upheld Respondent's convictions and life sentence, but reversed his death sentence and remanded the case for a new trial as to sentence. *Bowen v. State,* 241 Ga. 492, 246 S.E.2d 322 (1978). Following his retrial on the issue of punishment for murder, Respondent was again sentenced to death and appealed to the Supreme Court of Georgia, which affirmed the judgment of the trial court in *Bowen v. State,* 244

Ga. 495, 260 S.E.2d 855 (1979), *cert. denied*, 446 U.S. 970 (1980).

Next, Respondent filed a petition for writ of habeas corpus in the Superior Court of Butts County. A hearing was conducted by that court and, on March 20, 1981, the Superior Court of Butts County, Georgia, entered an order denying Respondent's petition for a writ of habeas corpus. Respondent filed an applicatioon for a certificate of probable cause to appeal in the Supreme Court of Georgia, which was denied by that court on September 8, 1981. The Supreme Court of the United States denied Respondent's petition for a writ of certiorari on February 22, 1982, with Respondent's petition for rehearing being denied on April 19, 1982. Respondent then had a new execution date set for May 25, 1982.

On May 24, 1982, Respondent filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, a motion for leave to proceed in forma pauperis and a motion for a stay of execution. On May 24, 1982, the district court granted Respondent's request for a stay of execution.

On February 25, 1982, the United States Magistrate entered an order finding that Respondent had presented sufficient evidence to establish a p*rima facie* case of jury discrimination in the Polk County jury selection system, and directed Petitioner to notify the magistrate as to whether he requested an evidentiary hearing to present evidence to rebut Respondent's *prima facie* claim.

An evidentiary hearing was held in the matter on April 19, 1983. On April 22, 1983, the United States Magistrate entered an order granting Petitioner's request for

an opportunity to submit additional documentary evidence and supplemental brief.

On October 31, 1983, the United States Magistrate issued a report and recommendation finding that, with respect to Respondent's challenge to the 1978 traverse jury pool, the Respondent had established a *prima facie* case of jury discrimination that was not rebutted by the state. Respondent filed objections to the report and recommendation of the magistrate, as did counsel for Petitioner.

On March 16, 1984, the United States District Court for the Northern District of Georgia, Rome Division granted habeas corpus relief finding that Respondent was entitled to a new trial as to guilt because of the allegedly impermissibly burden-shifting charge on intent. The Court also found that Respondent was entitled to a new trial because the traverse jury which resentenced Respondent to death was allegedly drawn from an unconstitutionally composed jury pool and because the prosecutor's closing argument during the sentencing phase of Respondent's trial allegedly went beyond the bounds of constitutional tolerance. (Appendix A).

On August 6, 1985, the Eleventh Circuit affirmed the district court's decision that the traverse jury was unconstitutionally composed, but reversed the district court's ruling on the *Sandstrom* and prosecutorial argument issues. *Bowen v. Kemp,* 769 F.2d 672 (11th Cir. 1985). (Appendix B). Respondent's petition for rehearing was denied on December 2, 1985. *Bowen v. Kemp,* 776 F.2d 1486 (11th Cir. 1985). (Appendix C).

Respondent's petition for writ of certiorari was denied on July 7, 1986. The Eleventh Circuit issued its man-

date on July 11, 1986, and on July 16, 1986, the mandate of this Court was made the judgment of the district court, thereby rendering the judgment granting Respondent a new trial, a final judgment. (Appendix D).

After the judgment of the Eleventh Circuit became final, the Court "on *sua sponte* reconsideration" ordered the case recalled by this Court sitting *en banc* with oral argument in an order dated January 28, 1987. (Appendix E). Petitioner objected to the recall of the mandate and filed a motion to reissue the mandate. The Eleventh Circuit ordered that briefs be filed by both parties concerning the jurisdictional issue. After the receipt of these briefs, the Court ordered that the motion to reissue the mandate be carried with the case. (Appendix F). On October 22, 1987, the Eleventh Circuit granted federal habeas corpus relief to Respondent on the basis of an allegedly burden-shifting charge on intent, which the Court found was not harmless error. (Appendix G). The jurisdictional issue was not addressed by the Eleventh Circuit.

## STATEMENT OF FACTS

The evidence presented by the state at Respondent's trial in the Superior Court of Polk County, Georgia, is fully set forth in the opinion of the Supreme Court of Georgia on Respondent's direct appeal to that Court. The Supreme Court of Georgia found as follows:

> There was evidence presented from which the jury was authorized to find the following facts: in the early evening of Sunday, May 22, 1987, the twelve-year-old

victim and two of her young girlfriends went to do some wash at a local laundromat. The victim and one friend then walked to a nearby store and while returning to the laundromat, saw the defendant sitting in his automobile parked at the curb. At that time the defendant was separated from his wife and had just had an argument with his girlfriend. He had been drinking. The victim asked the defendant to drive the two girls back to the laundromat and he agreed. After arriving at the laundromat, the victim asked the defendant if he would drive her to a cafe so that she could find her sister. Her friend got out of the automobile, and the defendant and the victim drove away. This was the last time the victim was seen alive.

The following afternoon when it began to rain, a man took refuge at a vacant house, noticed the door was open, looked inside and saw a body. Police were summoned. The victim's clothing was found beside a bloody mattress. The nude body had fourteen stab wounds about the face, chest and abdomen, one of which perforated the chest resulting in death from loss of blood. Material obtained from the vaginal tract revealed the presence of spermatozoa, indicating recent sexual intercourse.

Late Monday night, May 23, 1977, the Polk County sheriff's department learned that the defendant had voluntarily committed himself to the Northwest Regional Hospital in Rome. The defendant was interviewed at the hospital and after being advised of his rights, made an oral statement in the presence of the sheriff, a GBI agent and several hospital officials. The sheriff's testimony relating the oral statement

was corroborated by the defendant's taped statement the following Wednesday after the defendant had been transferred to the Polk County jail.

The sheriff testified as to the defendant's oral statement and the taped statement was played for the jury. After driving the two girls to the laundromat, the defendant and the victim drove to a vacant house. While still in the car, the defendant held a knife to the victim's chest, causing a wound. The victim had difficulty undressing and the defendant cut her shoelaces with a knife. They entered the abandoned house. After sexual intercourse, the victim got up and started running toward the door at which point the defendant stabbed her in the back with the knife. The victim turned around and the defendant stabbed her in the chest. The defendant said that the victim told him to go ahead and finish her off, and "then I went crazy and I just started stabbing her."

The defendant dressed, got in the car and noticed blood on his clothes. He threw the knife away, drove a short distance, changed into clothing he had in the car, and threw his other clothes off the side of the road. He proceeded to a truck stop and cleaned the blood from his arms with a washrag which he later threw into the bushes. He drank a bottle of iodine in an apparent suicide attempt. After waking up, he drove into Alabama, returned to Georgia and subsequently admitted himself to the hospital in Rome. The knife, defendant's clothing, washrag and iodine bottle were recovered by police and admitted into evidence.

*Bowen v. State*, 241 Ga. 492-493, 246 S.E.2d 322 (1978).

## REASONS FOR GRANTING THE WRIT

### I. THE STATES ARE ENTITLED TO RELY ON THE FINALITY OF JUDGMENTS BY FEDERAL HABEAS CORPUS COURTS REVIEWING STATE COURT CONVICTIONS IN DEATH PENALTY CASES.

In the instant case, the Respondent was granted federal habeas corpus relief by the federal district court, which court found that there had been an unconstitutionally composed jury compiled for purposes of participating in a resentencing proceeding as to Respondent. The district court also found that there was an unconstitutionally burden-shifting charge in this case so as to violate the principles set forth by this Court in *Frances v. Franklin,* — U.S. —, 105 S.Ct. 1965 (1985). (Appendix A). Petitioner appealed to the Court of Appeals for the Eleventh Circuit.

A panel of the Eleventh Circuit then affirmed the finding of the district court with respect to the unconstitutionally composed resentencing jury, but reversed the finding of the district court with respect to the instruction given at the Respondent's original trial and found that the instruction constituted harmless error under the facts of this case. Once the Eleventh Circuit affirmed the granting of federal habeas corpus relief with respect to Respondent and ordered that a new resentencing trial be conducted, Petitioner never filed any petition for rehearing, suggestion for rehearing *en banc* or petition for writ of certiorari to this Court with respect to that finding of the Eleventh Circuit. Instead, Respondent filed a petition for rehearing in the Eleventh Circuit and, when that was denied Respondent filed a petition for certiorari

in this Court seeking review of the Eleventh Circuit's finding with respect to the trial court's instruction at the original quilt-innocence phase of Respondent's trial.

Following the denial of Respondent's petition for a writ of certiorari by this Court, the Eleventh Circuit Court of Appeals issued its mandate on July 11, 1986. (Appendix D). The judgment of the Eleventh Circuit was made the judgment of the district court on July 16, 1986. Then, almost six months after the judgment of the Eleventh Circuit was made the mandate of the district court, the Eleventh Circuit ordered, *sua sponte,* that Respondent's case be reheard *en banc.* (Appendix E). This order had the effect of reinstituting Petitioner's original appeal from the granting of federal habeas corpus relief, without the consent of the Petitioner and when efforts had already been initiated by the state to comply with the Eleventh Circuit's mandate ordering that another resentencing trial for Respondent take place.

Petitioner filed a motion to reissue the mandate, contending in the Eleventh Circuit that that Court had no authority to reinstitute Petitioner's appeal without the consent of the Petitioner and against the Petitioner's will, especially in those circumstances where retrial proceedings had already been initiated to comply with the mandate of the Eleventh Circuit. (Appendix F).

Instead of addressing this issue and acting with no authority whatsoever for its action, the Eleventh Circuit then ordered that the jurisdictional issue be "carried with the case." (Appendix G). The jurisdictional issue was presented by the Petitioner in the *en banc* brief filed in the Eleventh Circuit and argued to that court, but was

not addressed in the final order of the Eleventh Circuit granting federal habeas corpus relief both with respect to the resentencing jury and the trial court's instructions at the original guilt-innocence phase of Respondent's trial. (Appendix H).

The Eleventh Circuit not only acted without authority in reinstituting an appeal of the State from the granting of federal habeas corpus relief, more than six months after relief was granted to the Respondent, but the actions of the Eleventh Circuit clearly undermine the doctrine of finality of judgments which is extremely critical, especially in the context of a capital case in which an execution of a person is being sought. In this case, the State of Georgia relied on the judgment of the Eleventh Circuit, which had been final for approximately six months, by initiating proceedings to comply with the mandate of the Eleventh Circuit and conduct a new resentencing trial for Respondent. However, as this Court is well aware, the State of Georgia also relies on those judgments of the Eleventh Circuit which find the denial of federal habeas corpus relief to be proper in capital cases and thereby, authorize the imposition of the lawful sentence of death imposed upon a habeas corpus petitioner. It is unconscionable to allow a federal appeals court to *sua sponte* reconsider a judgment rendered by a panel of that court over six months after the judgment has been final, without the initiation of either party to the federal habeas corpus action.

More importantly, the action of the Eleventh Circuit raises the serious question as to when a judgment may be considered final and when the State of Georgia may rely on the Eleventh Circuit as having finally ruled

upon the case so as to authorize the imposition of the lawful sentence of death.

The State of Georgia and federal habeas corpus petitioners who are subject to a death sentence, alike, share the need to be able to rely on the finality of judgments when the mandate has issued and made the judgment of the district court and actions based on that mandate have been initiated.

In the context of this case, the *en banc* court of the Eleventh Circuit always retained the power to overrule decisions of the previous panel in the *Bowen* case if the Court determined that the *Bowen* panel decision was in conflict with other precedent of the Circuit. Therefore, the Eleventh Circuit need not have granted *sua sponte* reconsideration by the *en banc* court of the prior decision already made final, in order to reconsider the legal precedent contained in the prior panel opinion. However, the Eleventh Circuit unconscionably chose to essentially revoke a prior final judgment upon which the State of Georgia had detrimentally relied in this case and upon which judgments the State of Georgia relies in every federal habeas corpus case, including those brought by persons under sentence of death in the State of Georgia.

The actions of the Eleventh Circuit set a dangerous precedent and totally undermine the concept of finality of judgments, especially when reviewing courts have had their decisions made final by receipt of the order in the court of origination. Taken to its logical extension, the actions of the Eleventh Circuit serve notice on the State of Georgia that any of its prior decisions may be reconsidered on the *sua sponte* motion of the court regardless

of the length of time between the judgment and the order directing reconsideration and regardless of whether either of the parties involved seek reconsideration or have relied, even to the extent of executing a person under sentence of death, upon that judgment.

Due to the dangerous precedent set by the Eleventh Circuit in this death penalty case which may have great ramifications in the State of Georgia, especially in capital cases, Petitioner respectfully submits that this Court should grant this petition for writ of certiorari to determine if the finality of judgment doctrine has been seriously undermined by the actions of the Eleventh Circuit.

## II. THE ELEVENTH CIRCUIT HAS ELIMINATED AS A MATTER OF LAW THE APPLICABILITY OF THE HARMLESS ERROR RULE IN ALL CASES WHERE A DEFENDANT PLEADS INSANITY.

Acting *en banc,* the Eleventh Circuit in this case, undertook a definitive analysis of the effect of the presentation of an insanity defense by a criminal defendant in Georgia on a determination of whether an allegedly burdenshifting charge on intent constituted harmless error. The Circuit Court cavalierly concluded that the *Rose v. Clark,* 478 U.S. —, 106 S.Ct. 3101 (1986), harmless error rule would "rarely" be applicable in a case where a defendant pleads insanity at trial and there is an "incantation" of the talismanic language from *Francis v. Franklin,* — U.S. —, 105 S.Ct. 1965 (1985), contained in the trial court's charge.

Consistent with its reluctant application of the principles of *Rose v. Clark, supra,* in capital cases, the Circuit Court, in this case and the companion case of *Ralph Kemp*

*v. Horace Dix,* application no. —, has embarked on a legal course resulting in the elimination of an entire class of cases entitled to a *Rose v. Clark* harmless error review. For all practical purposes, the Circuit Court has removed insanity defense cases as a matter of law from the purview of *Rose v. Clark.*

Contrary to the Circuit Court's holding (Appendix G, p. 15, Fn. 13), in most situations, an unsuccessful insanity defense precludes any consideration of whether the acts were intentional, by virtue of the nature of the defense itself. It is only in "rare situations" when an insanity defense will *not* include an admission that the acts committed were intentional. In this case and in the *Kemp v. Dix* case, the Respondents' insanity defenses included an admission that the acts resulting in the homicides were intentionally committed. The Circuit Court never reviewed the facts of this case to determine if the element of intent was contested by Respondent. Instead the Circuit Court merely held as a matter of black letter law that the presentation of an insanity defense ordinarily precludes the application of the harmless error rule of *Rose v. Clark, supra.*

As properly noted by Judge Hill in his dissenting opinion, the presumption in this case was the one reviewed by this Court in *Francis v. Franklin, supra,* i.e., the presumption that the acts of a person of sound mind and discretion are presumed to be the product of the person's will. *Francis v. Franklin, supra* at 970. Judge Hill properly found that the "sound mind presumption" was inapplicable to this defendant because by rejecting Respondent's insanity defense, the jury found Respondent to be

of sound mind. Finally, Judge Hill noted the implausible result reached by the Circiut Court:

> Until today, though, I know of no holding that the mere incantation of the presumption, directed toward a particular defendant, would spoil a conviction of one to whom it specifically does not apply.

Hill, J. dissenting, p. 2.

Judge Hill correctly related the manner in which the harmless error rule could be properly applied in the context of an insanity defense case by stating:

> Had either of the two defendants [Dix or Bowen] been found not to be of sound mind, that defendant's trial would not be in any sense affected by the presumption of intent. Thus, in the event of the finding of unsound mind, no constitutional error appears. On the other hand, in each case, if the defendant were found to be of sound mind, the instruction condemned in *Sandstrom* and *Franklin* would apply and our task would be to ascertain whether, under *Rose v. Clark*, — U.S. —, 106 S.Ct. 3101 (1986), the instruction was harmless error.

Hill, J. dissenting opinion, p. 3.

As Judge Hill's opinion illustrates, there can be no predetermination as a matter of black letter law that a *Rose v. Clark* harmless error analysis is inapplicable to a particular class of cases which is the focus of discussion. Rather, contrary to the obvious predisposition of the Circuit Court, these insanity defense cases must be examined under the totality of the circumstances, on a case by case basis. If such an examination were made in this case, not only would it be shown that Respondent did not contest intent, but also that the state overwhelmingly

proved it. Roney, J., concurring in part and dissenting in part; Fay, J. dissenting, p. 1 and 2; Hill, J. dissenting, p. 3; Edmondsen, J.; concurring in part and dissenting in part.

Without a case by case application of the *Rose v. Clark* harmless error rule, "We are at or near the point where The Great Writ automatically issues any time a trial judge is found to have instructed a jury that intention can be presumed from a person's acts." Hill, J. dissenting opinion, p. 1. (Appendix G).[1]

The elimination by the Circuit Court of the harmless error rule of *Rose v. Clark, supra,* as a matter of law in any case where an insanity defense is offered and an intent charge is given, regardless of the facts of the case, warrants the granting of a writ of certiorari.

## CONCLUSION

For all the above and foregoing reasons, Petitioner submits that this Court should grant a writ of certiorari to review whether the finality of judgment doctrine has been severely undermined by the Eleventh Circuit's *sua sponte* reconsideration of a death penalty case, six months

[1]It is clear that consistent with its reluctance to apply the harmless error rule in capital cases, the Circuit Court would totally disregard the nature of any defense proffered by a defendant in making a harmless error analysis, regardless of whether the asserted defense failed to contest the essential elements of the offense. Thus, the harmless error rule would be effectively eliminated.

after it has become final and further, to review whether or not a harmless error rule of *Rose v. Clark, supra,* has been circumvented by rulings of the Eleventh Circuit that have eliminated the application of the harmless error rule as a matter of law in cases where an insanity defense has been presented.

Respectfully submitted,

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## APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CHARLIE B. BOWEN,

Petitioner

v.

WALTER D. ZANT,
Warden, Georgia
Diagnostic and
Classification Center,

Respondent

CIVIL ACTION

NUMBER
C82-166R

(Filed March
16, 1984)

### ORDER

Presently before the Court is the petition for a writ of habeas corpus filed by Charlie Bowen. Bowen seeks relief from his conviction in the Superior Court of Polk County, Georgia on charges of murder and rape. Bowen received the sentence of death for his murder conviction.

Because the charge given during the guilt/innocence portion of Bowen's trial impermissibly shifted the burden of proving intent in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979), and because this error is not harmless beyond a reasonable doubt, he is entitled to a new trial. Bowen is also entitled to a new sentencing trial because 1) the traverse jury which sentenced him to death was drawn from an unconstitutionally composed jury pool, and 2) the prosecutor's closing argument during the sentencing trial went beyond the bounds of constitutional tolerance.

Accordingly, the petitioner's writ of habeas corpus is granted subject to the State of Georgia's right to retry him within a reasonable period of time.

## I. PROCEDURAL HISTORY

On August 29, 1977 the petitioner was tried on charges of murder and rape in the Superior Court of Polk County, Georgia. He was convicted on both charges on September 8, 1977 and was sentenced to death for the murder conviction and to life imprisonment for the rape conviction. The petitioner filed a direct appeal to the Georgia Supreme Court, which affirmed both the murder and rape convictions and the sentence of life imprisonment for the rape conviction. The case was, however, remanded to the Superior Court of Polk County for retrial on the issue of punishment for the murder conviction. *See Bowen v. State,* 241 Ga. 492 (1978).

A resentencing trial began on September 11, 1978, and the petitioner was resentenced to death for his murder conviction on September 14, 1978. Once again a direct appeal was taken to the Georgia Supreme Court, which affirmed the sentence of death for the murder conviction. *See Bowen v. State,* 244 Ga. 495 (1979). A petition for a writ of certiorari was filed with the United States Supreme Court, which was denied.

On September 2, 1980 a petition for a writ of habeas corpus was filed in the Superior Court of Butts County. An evidentiary hearing was held, and on March 20, 1981 the writ was denied by Judge Alex Crumbley. The order denying the writ of habeas corpus was refiled on April 27, 1981. The petitioner filed an application for a certificate

of probable cause to appeal the denial of the writ to the Georgia Supreme Court. This application was denied on September 8, 1981. The petitioner then filed a petition for a writ of certiorari with the United States Supreme Court on December 7, 1981, which was denied on February 22, 1982. *See Bowen v. Zant,* — U.S. — (1981). A petition for rehearing was thereafter filed with the United States Supreme Court and was denied.

On May 24, 1982 the petitioner filed an application for a writ of habeas corpus in this Court. An evidentiary hearing was held by the Magistrate on April 19, 1983. The Magistrate issued his Report and Recommendation on October 31, 1983, recommending the resentencing of the petitioner. Both the petitioner and the respondent have filed objections to this report.[1]

By virtue of the foregoing proceedings, the petitioner has exhausted all available state court remedies and his petition is properly before this Court. *See generally* 28 U.S.C. § 2254(b) (1977).

## II. FACTS

At approximately 9:00 p.m. on May 22, 1977 Shelia Young, Tangela Darden and Barbara High went to the laundrymat in Rockmart, Georgia. All three were young, black females. Young and High left the laundrymat and, while walking around, saw the petitioner drive-by in his car. Young asked the petitioner for a ride back to the laundrymat, and the petitioner agreed to this request. Young and High got into the petitioner's car. High noticed that the petitioner had some beer in his car. She also noticed some bottles in his car which resembled mercuro-

chrome bottles. The petitioner drove Young and High to the laundrymat, and High got out of the car. Young stayed in the car and went riding with the petitioner.

The petitioner drove Young out to a vacant house in the country. The petitioner stopped his car, removed a knife from the glove compartment and ordered Young to undress. She did so, and he ordered her to walk into the vacant house. Once inside the house, the petitioner forced Young to have sexual intercourse with him. After engaging in intercourse, Young asked the petitioner if he was going to hurt her. He replied negatively, and she ran to the door, attempting to escape. The petitioner caught her while she was still in the house and stabbed her once in the back and once in the chest. Young told the petitioner to "finish her off," and he repeatedly stabbed her in the chest and abdomen, killing her.

The petitioner went out of the house to his car, got Young's clothes and left them in the house. He threw his knife into the weeds, got into his car and drove towards Rockmart. Shortly thereafter the petitioner stopped his car, turned on an interior light and noticed blood on his clothes. He took off his clothes and threw them beside the road. The petitioner then put on some clothes he had in the trunk of his car and drove off.

The petitioner proceeded to a truck stop and washed some blood off of his arms with a washrag. He threw the washrag in the bushes. The petitioner then drove to an isolated road and stopped his car. He drank one of four bottles of iodine he had in his car, attempting to commit suicide. He threw the empty bottle of iodine out of the car. The suicide attempt was unsuccessful. The petitioner

slept for one or two hours, drove to Cedartown, Georgia and attempted to turn himself in at the sheriff's office. He was instructed that the sheriff was not in and that he should commit himself at the Northwest Regional Hospital in Rome, Georgia ("NWRH"), a mental health hospital. The petitioner voluntarily committed himself at NWRH at approximately 6:00 p.m. on May 23, 1977.

Upon admission to NWRH, Dr. Chong examined the petitioner and prescribed Mellaril and Sinequan for him. Both of these drugs are strong tranquilizers which can modify the function of the mind. It is unclear whether either of these drugs were administered to the petitioner.

At 10:00 a.m. on May 24, 1977, Dr. Bowling, a psychiatrist at NWRH, examined the petitioner. He ordered the discontinuation of all medication previously prescribed by Dr. Chong. Dr. Bowling did, however, prescribe the use of sleeping pills for the petitioner when necessary. The sleeping pills prescribed by Dr. Bowling would have had no material effect on the petitioner's ability to think in a rational manner. It is unclear whether the petitioner received any sleeping pills during his confinement at NWRH, although he received some type of pill on the morning of May 25, 1977. *See* Tr.[2] at 235.[3] After examining the petitioner, Dr. Bowling concluded that he was in a state of emotional tension and depression.

Sheriff Swafford, the Sheriff of Polk County, and Lewis Evans, an Agent for the Georgia Bureau of Investigation, were informed of the petitioner's commitment at NWRH on May 24, 1977. Earlier, they had been informed of Young's death[4] and their investigation of this incident led them to suspect the petitioner. Swafford and Evans

went to NWRH and interviewed the petitioner at about 3:30 p.m. on May 24, 1977. A security guard for NWRH, John Davis, was present during this interview, as were two NWRH psychiatrists—Kay Herndon and Mike Owens.

At the beginning of this interview, the petitioner was read his *Miranda* rights. He was also told that he was a suspect in the Young killing. Evans then asked the petitioner if he understood his rights. The petitioner responded affirmatively. He was then asked if he wished to waive his *Miranda* rights, which he did. The petitioner was given a release form, which he signed. *See* Tr., Exhibit S-36.

The petitioner then confessed to the murder. During this confession he told the officers about the location of his bloody clothes, the iodine bottle and the bloody washrag. The petitioner also consented to the search of his car and gave his shoes to Swafford and Evans, after they had noticed red stains on the shoes.[5] Finally, Swafford asked the petitioner to remove his shirt; he did so, and several scratch marks were seen on his abdomen and arms.

The interview conducted by Swafford and Evans on May 24, 1977 lasted for approximately one hour. During this interview Swafford and Evans did not offer the petitioner any benefit or reward to procure his confession, nor did they threaten him in any manner. Furthermore, Swafford and Evans noted that the petitioner appeared to understand the questions asked by them, although he appeared "fidgetty." *See* Rt.[6] at 122. After the interview Swafford and Evans left NWRH while the petitioner remained at the hospital. They located the bloody clothing the petitioner had thrown by the roadside, but were unable to find the washrag or the iodine bottle.

During the state habeas corpus evidentiary hearing, the petitioner stated, regarding the May 24, 1977 interview conducted by Swafford and Evans, that he "was not able to put the pieces together but that he cooperated with the sheriff the best that [he knew] how." Rt. at 459. *See also* SHC[7] at 73.

Dr. Bowling interviewed the petitioner on the morning of May 25, 1977. He noted in a report that the petitioner was alert and responsive, and that he spoke "coherently and rationally." Tr. at 367. Dr. Bowling also observed that the petitioner's "basic judgment and reasoning are not impaired at this time." *Id.* Additionally, Dr. Bowling reported that the petitioner stated, "My mind is clear today. I feel better." *Id.* After conducting an interview with the petitioner for approximately one and one-half hours, Dr. Bowling concluded that the petitioner had psychoneurosis, depressive type.

At approximately 2:25 p.m. on May 25, 1977 Swafford and Evans again interviewed the petitioner at NWRH. This interview was tape-recorded by Evans. At the beginning of the interview, the petitioner was read his *Miranda* rights, which he waived after he acknowledged that he understood them. During the interview the petitioner once again described his actions on the evening of May 22, 1977 and on May 23, 1977. At the end of the interview, the following interchange occurred:

> Q. O.K. Charlie, are you under the influence of any kind of drugs now while we're making this statement?
>
> A. Let's see. No, I think they gave me a pill . . . I had a pill today. I don't know what time it was. It in the early part.

Q. Your mind is clear?

A. Uh huh. My mind is clear. Yesterday . . . my mind wasn't clear yesterday but it's clear today.

Q. Today your mind is clear?

A. Yes sir.

Q. O.K. You're giving us this statement freely and voluntarily, are you not?

A. Yes sir, it's free . . .

Q. . . . We haven't threatened you in any way?

A. No.

Q. We haven't promised you any reward or anything?

A. No sir. That's the best . . . that's actually the best way I can tell it, you know, because I was distressed and I knew I ought to tell it.

Q. So you're wanting to get this off your chest and get it out of your mind so your mind will be clear, is that right?

A. Yes sir.

Tr. at 235.

The petitioner was arrested during the afternoon on May 25, 1977 and was taken to the Polk County jail.

After his arrest, the petitioner was questioned two more times. Both of these interviews occurred shortly after the petitioner's arrest, and he was not read his *Miranda* rights before these interviews. Either during these interviews or at other times, the petitioner helped Swafford and Evans locate the bloody washrag and the iodine bottle.[8]

## III. THE PETITION

In his petition for a writ of habeas corpus, Bowen contends that he is entitled to relief because

(1) the trial judge's sentencing instruction regarding aggravating circumstances was impermissibly vague;

(2) the trial judge's sentencing instructions shifted the burden of proof to the petitioner, in violation of *Sandstrom v. Montana,* 442 U.S. 510 (1979);

(3) his counsel rendered ineffective assistance during the guilt/innocence and sentencing phases of his trial;

(4) the trial court refused to grant his pretrial motion for an independent psychiatric examination;

(5) the trial court refused to grant his motion for funds to investigate the composition of the traverse jury pool;

(6) the trial court refused to grant his motion for funds for expert witnesses;

(7) the prosecutor made improper remarks during the second sentencing trial;

(8) the trial court improperly responded to the jury's question concerning parole while it was deliberating during the second sentencing trial;

(9) the trial court improperly failed to conduct a full and fair *Jackson-Denno* hearing to determine the admissibility of statements made by the petitioner at NWRH;

(10) the grand jury which indicted the petitioner was selected from an unconstitutionally composed jury pool;

(11) the traverse juries which convicted the petitioner and sentenced him to death were selected from an unconstitutionally composed jury pool;

(12) the prosecutor's practice of systematically striking all black persons from trial juries through his preemptory challenges violated the petitioner's sixth, eighth and fourteenth amendment rights;

(13) the trial court's sentencing instructions failed to adequately explain the relationship between aggravating and mitigating circumstances;

(14) the death penalty is applied in an arbitrary manner in the State of Georgia;

(15) the jury which convicted the petitioner did not constitute a representative cross-section of the community because all persons with conscientious or religious objections to capital punishment were systematically excluded from the jury;

(16) the systematic exclusion of all persons from the jury with conscientious or religious objections to capital punishment impermissibly created a prosecution-prone jury;

(17) the jury did not constitute a representative cross-section of the community because its members were biased in favor of the use of the death penalty against black persons;

(18) the jury convicted and sentenced the petitioner while under the influence of passion, prejudice and other arbitrary considerations;

(19) the electrocution of the petitioner would violate his eighth and fourteenth amendment rights because the death penalty is administered arbitrarily in the State of Georgia, is a theoretically groundless form of punishment and is contrary to contemporary standards of decency;

(20) the State of Georgia improperly refused to pay the costs associated with the investigation and presentation of the petitioner's state habeas corpus petition; and

(21) the State of Georgia engages in a pattern and practice of discriminatorily imposing the death sentence on the grounds of sex, race and poverty.

## IV. THE CHALLENGE TO THE TRAVERSE JURY DURING THE SENTENCING PORTION OF THE TRIAL

In Count Two of his petition, Bowen argues that the traverse jury which sentenced him to death in 1978 was "composed in violation of the Constitution of the United States. . . ." Petition at 13. Bowen does not indicate whether he challenges the composition of this jury on the basis of the equal protection clause of the fourteenth amendment, *see generally Alexander v. Louisiana,* 405 U.S. 625 (1972), or the representative cross-section of the community requirement contained in the sixth amendment. *See generally Castanedo v. Partida,* 430 U.S. 482 (1977). His claim therefore will be evaluated under both these amendments.

The court in *Davis v. Zant,* 721 F.2d 1478 (11th Cir. 1983), outlined the standards used to determine 1) whether a petitioner has made a prima facie showing of discrimi-

nation in the composition of a traverse jury pool under either the sixth or fourteenth amendments, and 2) whether a respondent has presented proof sufficient to rebut a prima facie showing of discrimination:

> The prima facie tests for an equal protection claim and a fair-cross-section claim are almost identical. In *Castaneda v. Partida*, 430 U.S. 482, 494 (1977), the Supreme Court summarized the requirements for proving an equal protection violation:
>
> > The first step is to establish that the group is one that is a recognizable, distinct class, . . . . Next, the degree of under-representation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. . . . Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.
>
> In *Duren v. Missouri*, 439 U.S. 357, 364 (1979), the elements of a prima facie violation of the fair-cross-section requirement were set out:
>
> > [T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process.
>
> [Claims under the sixth and fourteenth amendments] differ in the way the prima facie case is rebutted. *Compare Castaneda v. Partida, supra* at 497-98, (prima facie case rebutted by proving absence of discriminatory intent) *with Duren v. Missouri, supra*

> at 367-68, (prima facie case rebutted by proving significant government interest justifying the imbalance of classes). Mere affirmations of good faith [by jury commissioners do] not approach the threshold of either standard of proof. . . .

*Davis, supra,* at 1482-83. *See also Ross v. Hopper,* 716 F.2d 1528, 1538 (11th Cir. 1983); *Gibson v. Zant,* 705 F.2d 1543, 1546 (11th Cir. 1983). The Court will first analyze the petitioner's claim under the fourteenth amendment as it applies to the under-representation of females, and this analysis will render unnecessary an evaluation of the petitioner's other claims to the composition of his sentencing jury.

The petitioner has presented the following evidence to the Court regarding his challenge to the composition of the traverse jury pool from which his sentencing jury was selected:

1977 TRAVERSE JURY POOL

| Class | Number | % of pool | % of population[9] | Disparity |
|---|---|---|---|---|
| Males | 1427 | 69.7% | 47.5% | 22.2% |
| Females | 612 | 29.8 | 52.5 | 22.7 |
| Sex Unknown | 8 | .5 | - | - |

1975 TRAVERSE JURY POOL

| Class | Number | % of pool | % of population | Disparity |
|---|---|---|---|---|
| Males | 1290 | 70.6% | 47.5% | 23.1% |
| Females | 533 | 28.2 | 52.5 | 24.3 |
| Sex Unknown | 4 | 2.2 | - | - |

1973 TRAVERSE JURY POOL

| Class | Number | % of pool | % of population | Disparity |
|---|---|---|---|---|
| Males | 1352 | 86.2% | 47.5% | 38.7% |
| Females | 217 | 13.8 | 52.5 | 38.7 |

1971 TRAVERSE JURY POOL

| Class | Number | % of pool | % of population | Disparity |
|---|---|---|---|---|
| Males | 1201 | 76.7% | 47.5% | 29.2% |
| Females | 365 | 23.3 | 52.5 | 29.2 |

1969 TRAVERSE JURY POOL

| Class | Number | % of pool | % of population | Disparity |
|---|---|---|---|---|
| Males | 1103 | 76.5% | 47.5% | 29.0% |
| Females | 338 | 23.5 | 52.5 | 29.0 |

As women clearly are a distinct, recognizable class, the first portion of the *Castaneda* standard is met. *See Davis, supra* at 1482; *Gibson, supra,* at 1547; *see generally Willis v. Zant,* 720 F.2d 1212, 1215-17 (11th Cir. 1983). To meet the second portion of this standard, the petitioner must demonstrate the existence of a statistically significant degree of under-representation of women over a significant period of time. The petitioner's statistics span approximately a ten-year period. This period of time is a "significant" period of time. *See Gibson, supra,* at 1546-47 (10 year period); *Machetti v. Linahan,* 679 F.2d 236, 238, 240-41 (11th Cir. 1982) (20 month period), *cert. denied,* -- U.S. —, 103 S. Ct. 763 (1983). Further, the degree of underrepresentation of women shown over this period of time—22.7% to 38.7%—is statistically significant. *See Hernandez v. Texas,* 347 U.S. 475, 480-81 (1954) (14%); *Davis, supra,* at 1482-83 (18.1 to 18.4%); *Gibson v. Zant,* 705 F.2d 1543, 1546-47 (11th Cir. 1983) (21% to 38%).

The third portion of the *Castenda* standard requires the petitioner to demonstrate that the method of selecting the 1977 traverse jury pool "is susceptible of abuse or is not racially neutral. . . ." *Castaneda, supra.* GA.

CODE ANN. § 39-106 (Harrison 1981), the law in effect at the time the 1977 traverse jury list was composed, outlines the procedures jury commissioners in Georgia should follow in compiling jury lists:

> At least biennially, or, if the senior judge of the superior court shall direct, at least annually, the board of jury commissioners shall compile and maintain and revise a jury list of intelligent and upright citizens of the country to serve as jurors. In composing such list the commissioners shall select a fairly representative cross-section of the intelligent and upright citizens of the county from the official registered voters' list of the county as most recently revised by the county board of registrars or other county election officials. If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly represented thereon.
>
> After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, except as otherwise provided herein, and no new names shall be added until those names originally selected have been completely exhausted, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse jurors, such name shall be returned to the box and another drawn in its stead.

The Supreme Court has held that this method of selection is not inherently unfair, but contains the possibility of abuse. *See Turner v. Fouche,* 369 U.S. 346, 355 (1970). *See also Davis, supra,* at 1483; *Gibson, supra,* at 1547-49. The Court must therefore evaluate the procedures employed by the jury commissioners who selected the 1977 traverse jury pool to determine if the procedure they used is in fact class neutral.

Several jury commissioners testified at the federal habeas corpus evidentiary hearing regarding the procedures used to select the 1977 traverse jury pool. This testimony revealed that the jury commissioners took a voter's registration list and discussed the fitness of each person named on that list to serve on a traverse jury. No person was placed in the 1977 traverse jury pool who was not personally known and recommended by at least one of the commissioners. *See* FHC[10] at 8-10. It is apparent that this method of selection is susceptible to abuse. *See Davis, supra,* at 1483-85; *Gibson, supra,* at 1548. Thus, the petitioner has established a prima facie case of discrimination in the selection of the 1977 traverse jury pool.

The establishment of a prima facie case shifts the burden of proof to the respondent to prove that "racially neutral selection procedures have produced the monochromatic result." *Alexander v. Louisiana,* 405 U.S. 625, 632 (1972). To meet this burden of proof the respondent has offered only the testimony of jury commissioners who stated that they did not discriminate on the basis of race or sex in selecting members of the 1977 traverse jury pool. *See, e.g.,* FHC at 8-10. The Supreme Court has repeatedly held, however, that such affirmations of good faith are

"insufficient to overcome the prima facie case." *Whitus v. Georgia,* 385 U.S. 545, 551 (1967); *Alexander, supra; see also Davis, supra* at 1485. Accordingly, the Court finds that the petitioner was sentenced by an unconstitutionally composed traverse jury and that he is entitled to a new sentencing trial.[11]

## V. ADMISSION OF CONFESSIONS

In Count nine of his petition, Bowen argues that the admission of statements that he made to Swafford and Evans, and the introduction of evidence found as a result of these statements, violates his fourteenth amendment right to due process of law becaue the trial court did not afford him a full and fair *Jackson-Denno* hearing regarding the admissibility of these statements. The statements consist of two confessions made at NWRH and various statements made by Bowen to Swafford and Evans after he was arrested.

Under *Jackson v. Denno,* 378 U.S. 368 (1963), a defendant is entitled to have a "fair hearing and a reliable determination [outside of the presence of the jury] on the issue of [the] voluntariness" of a confession. *Id.* at 377, 380. In this case the *Jackson-Denno* hearing issue arose when Sheriff Swafford was on the stand during the guilt/innocence phase of Bowen's trial. Swafford was about to testify regarding the contents of Bowen's May 24, 1977 confession when Bowen's trial counsel, Mr. William Perry, moved for a *Jackson-Denno* hearing. *See* Tr. at 144. Perry's request was granted, and the jury was excused.

During the *Jackson-Denno* hearing, Perry cross-examined Swafford regarding whether Bowen was read

his rights before his May 24, 1977 confession, whether his statements were freely given and whether he was under the influence of any drugs on that day. *Id.* at 144-148. Swafford testified that Bowen was read his rights, that Bowen's statements were freely given, that he was told that Bowen had received only a sleeping pill on May 23, 1977. Perry then asked Swafford if he was aware of "the administration of a non-psychotic drug" to Bowen on May 24, 1977, which he was not. *Id.* at 148. Perry then conferred with the court out of the presence of the court reporter. As a result of this conference, the trial judge stated:

> The COURT: I think the testimony of the sheriff makes clear that as a preliminary matter I will have to find that the evidence, that is any statements, would be admissible insofar as the constitutional warning and the voluntariness of the admissions. *His testimony alone is sufficient and I would say this even if you had rebutting evidence. I'm not ruling that that evidence would not be admissible at a later time or possibly even now if you had it here* but I'm holding now as a matter of fact that the evidence of the sheriff is sufficient to lay the foundation for allowing this in evidence at this time. I am holding that it does meet the standard required for admissibility under the constitutional warning and that it is sufficient.
>
> MR. PERRY: Then I shall have time later to present this evidence to be considered by the court.
>
> THE COURT: I'll certainly hear from you concerning that at what ever time you offer it.
>
> MR. PERRY: I have no further questions.
>
> THE COURT: Do you have anything further before the jury comes back?
>
> [PROSECUTOR]: No sir.

THE COURT: All right. Let the jury come back in.

Tr. at 148-49 (emphasis added). No further hearing was conducted regarding the admission of Bowen's confession.

It is unclear from the record whether Perry had rebuttal evidence available to present during the *Jackson-Denno* hearing or whether he had access to rebuttal evidence which he was not ready to present. It is apparent that Perry had made some offer of proof to the trial judge regarding rebuttal evidence during the bench conference. It is also apparent that the trial judge determined that Bowen's confession was admissible solely on the basis of the sheriff's testimony. Perhaps the offer of proof was so inconsequential that, after the proof was presented, Bowen's confession still would have been admissible. Regardless of the many facts that are unclear from the record, it is apparent that the trial judge conducted an abbreviated *Jackson-Denno* hearing and found Bowen's confession admissible based solely on the testimony of the sheriff. Given these facts, this Court must hold that the petitioner's fourteenth amendment rights were violated because he was not afforded a full and fair *Jackson-Denno* hearing. *See McLallen v. Wyrick*, 494 F. Supp. 138, 140-42 (W.D. Mo. 1980); 28 U.S.C. § 2254(d)(i), (3) (6) (1977); *compare LaVallee v. Rose*, 410 U.S. 690 (1972) (per curiam); *Palmes v. Wainwright*, slip op. at 1911-15 (11th Cir. Feb. 17, 1984); *Alvord v. Wainwright*, slip op. at 1805-09 (11th Cir. Feb. 10, 1984).

The conclusion that the petitioner was not afforded a full and fair *Jackson-Denno* hearing does not entitle him to a new trial on the issue of his guilt or innocence

unless it is shown that the denial of a full and fair *Jackson-Denno* hearing constitutes error which is harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18 (1967); *see generally Washington v. Strickland,* 693 F.2d 1243, 1262 (11th Cir. 1982) (to meet the harmless error standard, the state must show that "in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for [the error]"). For purposes of this determination, the Court will assume the confession given by Bowen on May 24, 1977, was involuntary. *See generally Townsend v. Sain,* 372 U.S. 293, 307-08 (1962); *Blackburn v. State,* 361 U.S. 199 (1960). The Court will therefore focus its attention on two questions: 1) whether the confession given by Bowen on May 25, 1977 was admissible, and 2) whether his efforts in aiding Swafford in locating the bloody washrag and iodine bottle were voluntary, thus making these evidentiary items admissible. If the May 25, 1977 confession, the washrag and the iodine bottle are admissible, the premature conclusion of the *Jackson-Denno* hearing would constitute harmless error because the evidence which allegedly could have been suppressed was, in fact, not subject to suppression.[12]

The only material issue presented by the first question is whether Bowen's state of mental competency on May 25, 1977 precludes his confession from being "voluntary."[13] Three recent cases decided in this circuit shed light on this issue. In *Sullivan v. Alabama,* 666 F.2d 478 (11th Cir. 1982), the petitioner-appellee in a habeas corpus action argued that certain pre-*Miranda* statements he made after walking into a sheriff's office were involuntary—and hence inadmissible at his trial—because of his

"mental incompetency or insanity." *Id.* at 482. After summarizing the relevant law, the court found the petitioner's contention to be without merit:

> It is settled that statements or confessions made during a time of mental incompetency or insanity are involuntary and, consequently, inadmissible. *Townsend v. Sain,* 372 U.S. 293 (1963); *Blackburn v. State,* 361 U.S. 199 (1960). In deciding the ultimate issue of voluntariness, though, we may substitute our independent judgment after a review of the entire record. *Jurek v. Estelle,* 623 F.2d 929 (5th Cir. 1980), *cert. denied,* 450 U.S. 1001 (1981). *See Beckwith v. United States,* 425 U.S. 341 (1976); *Brown v. Allen,* 344 U.S. 443, 507 (1953) (opinion of J. Frankfurter). Voluntariness is premised on the totality of the circumstances. *Blackburn v. State,* 361 U.S. at 206. In this case, there is no persuasive evidence or strong probability of Sullivan's insanity. *See Blackburn v. State,* 361 U.S. at 207, 209 (compelling evidence and strong probability of insanity demonstrated the involuntariness of the confession). No medical evidence of the petitioner's insanity was presented during the trial or on the petition for habeas corpus. He relies solely on the affidavits of his mother, his attorney, a psychiatric social worker and a maintenance worker who was at the jail at the time of his arrival. These people, three of whom observed Sullivan after his conversations with [employees of the sheriff's office] described him as being upset, depressed and confused. Nonetheless, the district court did not give great weight to these affidavits. Record at 144. Sgt. Gardner, the one who actually questioned Sullivan, testified that he was very excited and disturbed, but, nevertheless, was coherent and responsive to questions. Trial Transcript at 14-15, 37. Mere emotionalism and confusion do not dictate a finding of mental incompetency or insanity. Inasmuch as no *Miranda* warnings were required and since the pre-Miranda statements were voluntary, there was no constitutional error in their admission.

*Sullivan, supra* at 482-83.

In *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983), the petitioner argued that certain post-*Miranda* statements were inadmissible because his "low IQ and history of emotional problems" rendered his confession involuntary. *Id.* at 567. As in *Sullivan*, the *Corn* court found the petitioner's contention unpersuasive:

> While it is true that statements or confessions made during a time of mental incompetency or insanity are involuntary and hence inadmissible, mere emotionalism and confusion do not necessarily invalidate them. *Sullivan v. Alabama*, 666 F.2d 479 (11th Cir. 1982). The record indicates that Corn remained calm and responsive throughout the interrogation, but was a bit shaken while his wife was present. Record, vol. 7 at 1319-20. He did not appear to be confused or incompetent so as to call into question the voluntariness of his confession. Although Corn was of below-average intelligence, he admitted that he was familiar with the criminal process and he understood the policemen's statements to him. His mental capacity was also evaluated at a hearing held pursuant to the rule in *Jackson v. Denno*, 378 U.S. 368, (1964), and the court determined that he understood his rights. Record, vol. 7 at 1310; *see United States v. Bush*, 466 F.2d 236 (5th Cir. 1972). The voluntariness of a confession is premised on the totality of the circumstances, *Sullivan*, 666 F.2d at 482-83, and based on that standard, we agree that Corn's inculpatory statements was voluntary and properly admissible into evidence.

*Corn, supra*, at 567.

Most recently, in *United States v. Parr*, 716 F.2d 796 (11th Cir. 1983), it was held on direct review that certain incriminating statements were voluntarily given despite

the ingestion by the defendant of large quantities of medication several days before the statements were made. In reaching this conclusion, the court focused on 1) the time that passed between the ingestion of the medication and the giving of the statements (five days), and 2) testimony establishing the coherent nature of the defendant at the time he made the statements. *Id.* at 817-18.[14]

In this case Bowen was admitted to NWRH on May 23, 1977. That evening he may have received several strong sedatives. On May 24, 1977 Bowen was examined by Dr. Bowling, who concluded that he was in a state of emotional tension. That afternoon Bowen was interviewed by Swafford and Evans, who state that he was coherent, but nervous. Bowen stated later that he was not "able to put the pieces together" during the interview. *See* Rt. at 459. On the night of May 24, 1977 Bowen may have received a sleeping pill, but no heavy sedatives were administered to him.

On May 25, 1977 Dr. Bowling interviewed Bowen and found him alert and responsive. Additionally, Bowen stated during this interview that, "My mind is clear today." Tr. at 367. As a result of this interview, Dr. Bowling concluded that Bowen suffered from psychoneurosis, depressive type. On the afternoon of May 25, 1977 Bowen was again interviewed by Swafford and Evans. He was coherent and responded logically to the questions asked by these officers.

Given these facts, the Court concludes that the statements made by Bowen to Swafford and Evans on May 25, 1977 were voluntary and thus properly admissible. *See generally Palmes, supra,* at 1911-13; *Alvord, supra,* at 1809-10.

Regarding Bowen's efforts in aiding Swafford in locating the bloody washrag and iodine bottle, all the evidence in the record indicates these efforts were voluntary. *See* Rt. at 458-61. Accordingly, the May 25, 1977 confession, the washrag and the iodine were admissible. Thus, the error caused by the truncated *Jackson-Denno* hearing is harmless beyond a reasonable doubt, and Bowen is not entitled to relief on Count nine of his petition.[15]

## VI. THE PROSECUTOR'S REMARKS DURING THE SENTENCING HEARING

In Count seven of his petition, Bowen contends that the following closing remarks, made by the prosecutor during the sentencing trial, violated his constitutional right to a fair trial:

> And now we come up here with this idea that here is a man that even though he knew that he himself . . . even though he was convicted in his own heart and he desired to die and we are approached with the proposition that he is subject to be rehabilitated and released back into our society.
>
> Yeah, I guess he can be rehabilitated. Hitler could have been. I believe in about six or eight months if I'd had him chained to a wall and talked to him and beat him on one side of the head for a while with a stick telling him you believe this don't you then beat him on the other side with a stick telling him you believe that don't you I believe I could have rehabilitated Hitler.
>
> Yeah, it's conceivable that he could come back into society. It's conceivable that he can go back to work at Goodyear mills in the twister room. Yeah, it's conceivable that he can go see Angie some more. Yeah, it's conceivable that he can be let out to gamble, it's conceivable that he can be let out to drink his

> beer and smoke his marijuana, and it's conceivable that he could pick up another little twelve year old girl, if you want him to all you've got to do is . . .

Tr. at 576-77.

To prevail on a claim of prosecutorial misconduct during a capital trial, a petitioner must show that a prosecutor's comments rendered his trial fundamentally unfair. *See Donnelly v. De Christoforo,* 416 U.S. 637, 642-43 (1974); *Hance v. Zant,* 696 F.2d 940, 950 (11th Cir. 1983), *cert. denied* — U.S. —, 103 S. Ct. 3544 (1983). In making this determination a court should consider the totality of the circumstances, i.e., the prosecutor's conduct should be considered in the context of the entire trial. *Id.* A court should, however, focus its inquiry on the following considerations: (1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks are isolated or extensive; (3) whether the remarks were deliberately or accidentally placed before the jury; and, except in the sentencing phase of capital murder trials, (4) the strength of the competent proof to establish the guilt of the accused. *See id.* at 950 n. 7. The standard for "fundamental fairness" during the guilt/innocence phase of a capital trial is exacting. *See Darden v. Wainwright,* 699 F.2d 1031, 1036 (11th Cir. 1983) (a finding that "the prosecutor's remarks were undesirable or even universally condemned" does not meet the standard). This standard is less rigorous during the sentencing phase of a capital trial, however, because of the importance of excluding passion from the sentencing procedure. *Hance, supra,* at 951.

Recent cases which have addressed the propriety of remarks made by a prosecutor during the sentencing phase

of a capital trial appear to condemn remarks on "issues extrinsic to the crime or the criminal aimed at inflaming the jury's passions, playing on its fears and otherwise goading it into an emotional state, . . ." while finding "even the most graphic description of a murder and characterization of [a] criminal" constitutionally permissible, so long as the description is in accord with the evidence in the case. *Tucker v. Zant,* slip op. at 1510 (11th Cir. Jan. 20, 1984); *compare id.* at 1507-1512 (remarks impermissible) and *Tucker v. Francis,* 723 F.2d 1504, 1506-08 (11th Cir. 1984) *and Brooks v. Francis,* 716 F.2d 780, 787-90 (11th Cir. 1983) *and Hance, supra,* at 950-53 *with Moore v. Zant,* 722 F.2d 640, 648 (11th Cir. 1983) (remarks permissible) *and McCorquodale v. Balkcom,* 705 F.2d 1553, 1556-57 (11th Cir. 1983) *and Cronnon v. Alabama,* 587 F.2d 236, 251 (5th Cir. 1979).[16] Furthermore, although "a defendant's prospects for rehabilitation are a relevant topic for argument, a prosecutor may not discuss his own opinion of those prospects and may not do so in . . . emotional and bombastic terms." *Tucker v. Zant, supra,* at 1511.

In this case it is apparent that the allegedly improper remarks constitute an emotional and bombastic statement of the prosecutor's personal opinion regarding the petitioner's prospects for rehabilitation. Further, it is clear that the prosecutor made these remarks deliberately. Also, although most of the other portions of the prosecutor's closing argument were in accord with the evidence presented at the sentencing trial, several portions of this argument consisted of calculated appeals to the emotions of the jury and statements of personal opinion. *See* Tr. at 564 ("If you [the jury] want him . . . [to] go back and be

a rehabilitated man] fine, but I don't want him in my society"); *id.* at 565 (the petitioner is a "product of the devil"); *id.* at 567 (the petitioner is a liar); *id.* at 569 (the petitioner is "no better than a beast"); *id.* at 575 (the prosecutor commented about the petitioner drinking iodine: "I wish he had woke up dead"); *id.* at 578-79 ("We are living in the days of Cain and the voices heard are Able's crying out to us all the time the voices of the murdered cry out. To whom do they cry? . . . To you," the jury); *id.* at 529 ("You know for a criminal to go without proper punishment is a disgrace to the society we live in and its shown to us every day by the fruits that we reap from day to day in our society when we have the bloody deeds such as this occur"). Additionally, the prosecutor used "war horse" tactics throughout the sentencing trial. Thus, after considering the prosecutor's conduct throughout the sentencing hearing, the Court concludes that the prosecutor's comments regarding the petitioner's prospects for rehabilitation rendered the petitioner's sentencing trial fundamentally unfair. This holding mandates a new trial on the issue of punishment only. *See Tucker v. Francis, supra,* at 1506.

## VII. THE *SANDSTROM* ISSUE

In the second count of his petition, Bowen argues that the following charge impermissibly shifted the burden of proof in violation of *Sandstrom v. Montana,* 442 U.S. 510 (1979):[17]

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act but the presump-

> tion may be rebutted. A person will not be presumed to act with criminal intention but the tryor of facts, that is you the jury, may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted.

Tr. at 458. *See also id.* at 461. This charge was preceded by language indicating that "every person is presumed innocent until proven guilty" and that no "person shall be convicted of a crime unless each element of such crime is proved beyond a reasonable doubt." *Id.* at 455. The charge was followed by a delineation of the insanity defense, which included the statement that

> The burden of proof of insanity is linked with that of criminal intent and the presumption of the defendant's innocence. If the jury entertains a reasonable doubt of the defendant's guilt on the whole showing including the question of insanity they must give the benefit of the doubt to the accused person and acquit him subject to the basic rule that the evidence of insanity must be sufficient to the reasonable satisfaction[18] of the jury.

*Id.* at 461. Also following the charge was a restatement of the general reasonable-doubt standard. *Id.* at 464.

The Court of Appeals for the Eleventh Circuit has recently decided several cases which concerned similar instructions. In *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983), the petitioner argued that the following three portions of the trial judge's charge, when taken in conjunction, shifted the burden of proving the absence of malice to him: (1) "the law presumes every intentional homicide to be malicious unless the contrary appears from circumstances of alleviation and justification, mitigation or excuse;" (2) a person of sound mind and discretion is presumed to in-

tend the natural and probable consequences of his acts;" and (3) "the law presumes every person to be sane unless it is shown to the contrary that he is insane or of unsound mind." *Id.* at 558. The court indicated that these instructions, standing alone, might be burden-shifting. It held, however, that the instructions were not burden-shifting because of the existence of curative language found in the charge, such as the statements that "a person will not be presumed to act with criminal intention, that the presumption of intent "may be rebutted" and that "if such evidence produced against the accused . . . discloses [that] the homicide was done without malice, then this presumption that the homicide is malicious does not exist." *Id.* at 559.[19]

In *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983), the court held the following italicized instruction, which is identical to the challenged instruction in this case, to be burden-shifting:

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

*Id.* at 1209 (emphasis deleted). The court so held because 1) the charge created a mandatory rebuttable presumption, and 2) the jury was never informed regarding the

weight of the burden placed on the petitioner to rebut this presumption:

> The problem with the charge on intent here is that the jury was never enlightened as to the nature of the burden on Franklin to rebut the presumption that he intended the killing. If the jury was persuaded that Franklin had to produce more than some evidence that he did not intend to kill, the burden shifted impermissibly on an element essential for a malice murder verdict.

*Id.* at 1211. *Compare Davis v. Zant,* 715 F.2d 1478, 1488 (11th Cir. 1983). The court also found that portions of the charge which stated that "criminal intent is not presumed" and "the burden of proof to show every element of the crime is on the State" did not cure the burden-shifting effect of the challenged portion of the charge because "the jury could have interpreted [the burden-shifting and curative] instructions as [logically consistent, i.e. as] indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." *Id.* at 1211-12.

Two months after *Franklin* was decided, the court in *Tucker v. Francis,* 723 F.2d 1504 (11th Cir. 1984), found the following instruction not to be burden-shifting, although it is identical to both the instruction challenged in this case and the instruction held to be burden-shifting in *Franklin:*

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted. A person will not be

> presumed to act with criminal intention, but the trier of fact, that is you the Jury, may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

*Id.* at 1517. The court found the instruction not to be burden-shifting because

> the instruction repeatedly announced its own permissiveness. The final sentence brings home to the jury its fact-finding role: "[a] person will not be presumed to act with criminal intent" [unless the jury so finds from the evidence]. We [therefore] conclude that this instruction would not unconstitutionally mislead the jury as to the prosecution's burden of proof.

*Id.*

Eleven days after *Tucker* was decided, the *Franklin* court denied the respondent's petition for a rehearing, affirming its original conclusion regarding the burden-shifting effect of the challenged charge. *See Franklin v. Francis,* slip op. (11th Cir. Jan. 27, 1984) ("Franklin II"). In reaffirming its earlier decision, the court in *Franklin II* distinguished *Corn* on the basis of the curative instructions found in that case. The court did not, however, mention the *Tucker* decision.

The Court finds the *Franklin* analysis persuasive. It is well established that a mandatory presumption is burden-shifting unless the presumption "imposes an extremely low burden of production—e.g. being satisfied by 'any' evidence—" on a defendant. *See Ulster County Court v. Allen,* 442 U.S. 140, 157 n. 16 (1978); *see also Sandstrom, supra,* at 524. The challenged instructions in this case—like the challenged instructions in *Franklin*—

place on Bowen the burden to rebut the mandatory presumption of intent, but they do not specify the nature of this burden. Thus, a reasonable juror could infer that the burden placed on Bowen to rebut the mandatory presumption was greater than the "some evidence" burden. Accordingly, the challenged instruction is impermissibly burden shifting. *See Sandstrom, supra,* at 517-19.

The fact that the challenged charge in this case is accompanied by an instruction explaining the relationship between the burden of proving intent and the defense of insanity does not distinguish this case from *Franklin.* The instruction explaining the intent-insanity relationship provides:

> The burden of proof of insanity is linked with that of criminal intent and the presumption of the defendant's innocence. If the jury entertains a reasonable doubt of the defendant's guilt on the whole showing including the question of insanity they must give the benefit of the doubt to the accused person and acquit him subject to the basic rule that the evidence of insanity must be sufficient to the reasonable satisfaction of the jury.

Tr. at 461. This instruction does not cure the burden-shifting effect of the intent charge in this case because the jury, when considering the intent charge and the insanity charge, could have interpreted these instructions "as indicating that the [intent charge] was a means by which proof beyond a reasonable doubt as to intent could be satisfied." *Franklin, supra,* at 1211-12 (quoting *Sandstrom, supra,* at 518-19 n. 7)). Thus, the insanity charge does no more to explain the import of the burden-shifting intent instruction than the curative instructions found

in *Franklin*. *See Franklin, supra; compare Davis, supra; Corn, supra*. The instructions contained in the trial judge's charge stating that "every person is presumed innocent until guilty" and that "no person shall be convicted of a crime unless each element of such crime is proved beyond a reasonable doubt" are similarly defective. *See Franklin, supra*. Accordingly, the Court concludes that the charge challenged in this case impermissibly shifted the burden of proving intent to the petitioner.

This holding does not end the inquiry, however, as a determination must be made regarding whether the *Sandstrom* error is harmless beyond a reasonable doubt. In *Connecticut v. Johnson*, slip op. (U.S. Sup. Ct. Feb. 23, 1983), the Supreme Court held, in a plurality opinion, that a *Sandstrom* error could never be considered error harmless beyond a reasonable doubt. A plurality opinion of the Supreme Court does not overrule past precedent, however, and the law of this Circuit before *Connecticut* was "that a *Sandstrom* error *may* be held harmless [beyond a reasonable doubt] *Spencer v. Zant*, 715 F.2d 1562, 1578 (11th Cir. 1983) (emphasis added) (citing *Lamb v. Jernigan*, 683 F.2d 1332, 1342 (11th Cir. 1982), *cert. denied*, — U.S. —, 103 S. Ct. 1276 (1983)). Whether a *Sandstrom* error is harmless beyond a reasonable doubt thus must be determined on a case-by-case basis. In determining whether error is harmless beyond a reasonable doubt, the "question is whether the error might have contributed to the conviction," and if overwhelming evidence of guilt on the burden-shifting error exists, the error will be considered error which is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 23 (1967); *see Mason v. Balkcom*, 669 F.2d 222, 226-27 (5th Cir. 1982) (Unit B),

*cert. denied* — U.S. —, 103 S. Ct. 1260 (1983); *compare Franklin, supra,* at 681 (error not harmless because the sole defense was lack of intent to kill and the facts did not overwhelmingly preclude that defense) *with Brooks v. Francis,* 716 F.2d 780, 793-94 (11th Cir. 1983) (harmless error where there was overwhelming evidence of guilt) *and Spencer, supra* (same) *and Lamb, supra* at 1342 (same) *and Hearn v. James,* 677 F.2d 841, 843 (11th Cir. 1982) (error harmless because it shifted the burden on an element not required for conviction on the offense of voluntary manslaughter).[20]

In this case overwhelming evidence of the fact that Bowen killed Young exists. Overwhelming evidence of his sanity—and hence his intent to kill Young—does not, however, exist. Dr. Bowling, a psychiatrist at NWRH, testified that Bowen did not know the difference between right and wrong when he killed Young. Further, several of Bowen's character witnesses testified regarding the shocking effect of the news that Bowen had killed Young. Dr. Dellatore testified, however, that Bowen was of a sane mind when he killed Young. In light of the less than overwhelming evidence of Bowen's intent to kill Young, *compare Spencer v. Zant,* 715 F.2d 1562, 1578 (11th Cir. 1983), and in light of the fact that Bowen's sole defense centered on his mental capacity at the time he killed Young, the Court holds that the *Sandstrom* error is not harmless beyond a reasonable doubt and necessitates Bowen's retrial.[21]

## VIII. DENIAL OF MOTION FOR INDEPENDENT PSYCHIATRIC EXAMINATION

In Count four of his petition, Bowen argues that the trial court's refusal to grant his pre-trial motion for an independent psychiatric examination violated his sixth, eighth and fourteenth amendment rights.

In *Westbrook v. Zant,* 704 F.2d 1487 (11th Cir. 1983), a similar contention was raised. There the petitioner's trial counsel requested the trial court to appoint an independent qualified psychiatrist to determine whether the petitioner's prior incarceration had affected his ability to conform to acceptable societal standards. This evidence was to be used to demonstrate the mitigating circumstance of the debilitating affect of this incarceration.

In evaluating this contention, the court noted that the granting of a request for the appointment of an expert at trial is under Georgia law, a matter of trial court discretion. The court then applied the relevant standard of review—whether the trial court abused this discretion so as to render the petitioner's sentencing trial fundamentally unfair. *Id.* at 1497. The court found no such abuse of discretion because 1) the petitioner's inability to conform his conduct to acceptable societal standards due to a history of incarceration was not "a critical piece of evidence;" 2) the effect of the petitioner's incarceration was placed before the jury by other evidence; and 3) the evidence the petitioner sought from the psychologist could have been demonstrated by other methods. *Id.*

More recently, in *Moore v. Zant,* 722 F.2d 640 (11th Cir. 1983), the Court of Appeals for the Eleventh Circuit

held that the trial court's refusal to provide the petitioner with funds to retain his own expert to evaluate the physical evidence in the case did not render his trial fundamentally unfair, even though much of the testimony in the case involved scientific analysis. Apparently, the court based its holding on the fact that the petitioner was given the opportunity to cross-examine the expert witnesses that did testify at the trial. *Id.* at 648-49.

In light of *Westbook* and *Moore,* the Court cannot hold that the trial court's refusal to grant the petitioner's motion for an independent psychiatric examination rendered his trial fundamentally unfair. The petitioner was able to place Dr. Bowling, a psychiatrist at NWRH, on the stand, and he testified that the petitioner did not know the difference between right and wrong at the time he stabbed Young to death. Further, the petitioner was able to cross-examine the psychiatrist who testified on behalf of the state, Dr. Jose Dellatore. Finally, the petitioner was able to place several of Bowen's acquaintances on the stand who testified regarding how shocking Bowen's actions were on May 22, 1977. Accordingly, the petitioner's argument is without merit.

## IX. PROSECUTOR'S USE OF PEREMPTORY CHALLENGES

In Count 12 of his petition, Bowen argues that the "action of the prosecution in striking all black persons" from the traverse juries which convicted and sentenced him to death violated his sixth, eighth and fourteenth amendment rights. This contention is actionable, however, only under the fourteenth amendment, *see Willis v. Zant,* 720 F.2d 1212, 1219 n. 14, 1217-21 (11th Cir. Nov. 17, 1983),

and only when a petitioner demonstrates the existence of a systematic practice of exclusion of blacks from juries by a prosecutor. *See Swain v. Alabama,* 380 U.S. 202, 223 (1965). To prove a systematic exclusion claim, a petitioner must show that a "prosecutor . . . , in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries. . . ." *Id.* at 223-24. *See also Willis, supra,* at 719-21.

In this case the only evidence supporting the petitioner's claim that the prosecutor systematically excluded blacks from traverse juries is a statement made by his trial counsel at the state habeas corpus evidentiary hearing. The petitioner's counsel stated that the prosecutor would strike blacks from the jury "in an important case involving a black person charged with an offense." SHC at 117. At this same hearing, the prosecutor denied that he systematically excluded all blacks from juries. *See* SHC at 120. The petitioner's evidence falls short of the showing of systematic disenfranchisement necessary to prevail on systematic exclusion claim. Relief is therefore denied on Count 12 of the petition.

## X. THE *WITHERSPOON* CHALLENGE

IN Counts 15 and 16 of his petition, Bowen argues that the systematic exclusion of all persons having conscientious or religious scruples against the imposition of capital punishment from the juries that convicted and sentenced him violated his right to a trial by a jury selected

from a representative cross-section of the community. It has been held, however, that the exclusion of venirepersons under *Witherspoon* does not violate the "representative cross-section of the community" requirement contained in the sixth and fourteenth amendments. *See Corn v. Zant,* 708 F.2d 549, 565 (11th Cir. 1983); *Smith v. Balkcom,* 660 F.2d 573, 574-79 (5th Cir. 1981); *cert. denied,* — U.S. —, 103 S. Ct. 181 (1982); *Spinkellink v. Wainwright,* 578 F.2d 582, 596-98 (5th Cir. 1978), *cert. denied,* 440 U.S. 976 (1979).

In Count 17 of his petition, Bowen contends that his sixth and fourteenth amendment rights were violated because he was "sentenced to die by a jury that . . . was unrepresentative and biased in favor of the prosecution on the issue of petitioner's guilt of the crimes with which he was charged, and biased in favor of the use of the death penalty against black persons." Petition at 18. Bowen argues that the jury was so inclined because of the *Witherspoon*-qualification of the jury, the manner in which the grand and traverse jury pools were selected and the prosecutor's practice of systematically eliminating blacks from juries. The *Witherspoon*-qualification of a jury does not result in a "prosecution prone" jury. *See Corn, supra; McCorquodale v. Balkcom,* 705 F.2d 1553, 1556 (11th Cir. 1983); *Smith, supra; Spinkellink, supra* Further, the effect of 1) the manner of selection of the grand and traverse jury pools, and 2) the prosecutor's practice of systematically excluding blacks from juries produced a jury biased in favor of imposing the death penalty against black persons, have been treated in Sections IV and IX of this order. Accordingly, counts 15, 16 and 17 of the petition are without merit.[22]

## XI. DENIAL OF FUNDS TO INVESTIGATE THE COMPOSITION OF THE TRAVERSE JURY POOL

In Count five of his petition, Bowen argues that the trial court's failure to grant his motion for funds to investigate the composition of the traverse jury before his second sentencing trial violated his sixth, eighth and fourteenth amendment rights to a fair trial. Regardless of the merit of this contention,[23] it is moot as the Court has found the petitioner's challege to the composition of the traverse jury at the second sentencing trial meritorious. *See* Section IV, *supra.*

## XII. DENIAL OF FUNDS FOR THE INVESTIGATION AND PRESENTATION OF THE STATE HABEAS PETITION

In Counts 6 and 20 of his petition, Bowen contends that his sixth and fourteenth amendment rights were denied "by the failure of the State of Georgia . . . to provide counsel, pay the costs of subpoenas and mileage for witnesses, pay for expert witnesses, an investigator, and such other costs as are necessary to pursue a state habeas corpus petition." Petition at 22. Bowen's contention is without merit because he has neither a statutory or constitutional entitlement to the appointment of counsel, payment of witness fees and other costs during state habeas corpus proceedings. *See Ross v. Moffitt,* 417 U.S. 600, 617-18 (1974); *Burston v. Caldwell,* 477 F.2d 996, 999 (5th Cir. 1973); O.C.G.A. § 17-12-60 to -62 (Michie 1981) (counsel may be appointed in capital cases only for superior court proceedings and the direct appeal of these proceedings); *compare Westbrook v. Zant,* 704 F.2d 1487, 1494-97 (11th Cir. 1983).[24]

## XIII. THE PROPORTIONALITY REVIEW

In Count 14 of his petition, Bowen apparently challenges the constitutionality of the proportionality review conducted by the Georgia Supreme Court. Before evaluating the merits of this contention, it is necessary to discuss the function of the Georgia Supreme Court in reviewing death penalty cases on direct review and the federal habeas standard for reviewing the actions of the Georgia Supreme Court.

Under Georgia law, the Georgia Supreme Court must conduct an expedited direct review of a case in which the death penalty is imposed. *See* O.C.G.A. § 17-10-35 (Michie 1981) (formerly GA. CODE ANN. § 27-2537 (Harrison 1978)). In reviewing a death sentence, the court must determine whether the sentence was imposed "under the influence of passion, prejudice, or any other arbitrary factor," whether the evidence supports the finding of statutory aggravating circumstances, and "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." O.C.G.A. § 17-10-35(d) (Michie 1981). The court must also include in its decision a reference to cases upon which it based its proportionality review. *Id.* § 17-10-35(e).

In *Moore v. Balkcom*, 709 F.2d 1353 (11th Cir. 1983), the Court of Appeals for the Eleventh Circiut set forth the standard that a federal court should use when reviewing the proportionality analysis conducted by a state court. The *Moore* court first stated that a federal court's only function in conducting such a review is to determine "whether the [state] court has properly performed the

task assigned to it under the [applicable statutes]." *Id.* at 1359 (quoting *Gregg v. Georgia,* 428 U.S. 153, 224 (1976)). Thus, a federal court is limited to determining whether "the application of approved sentencing procedures in a particular case creates a substantial risk that the punishment has been inflicted in an arbitrary and capricious manner." *Moore, supra* (citing *Edmund v. Florida,* — U.S. —, 103 S. Ct. 3368 (1982)). Accordingly, a case-by-case analysis of the cases used by a state court in its proportionality review is inappropriate. *See Moore, supra.* When, however, a "'petitioner who has been sentenced to death can show that the facts and circumstances of his case are so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience," habeas corpus relief should be granted. *Moore, supra,* at 1359-60; *see also Tucker v. Zant,* slip op. at 1517-18 (11th Cir. Jan. 20, 1984).

In reviewing the imposition of Bowen's death sentence after his second sentencing trial, the Georgia Supreme Court found that the petitioner's "sentence to death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." *Bowen v. State,* 244 Ga. 495, 502 (1979). The court listed, in an appendix, the cases upon which it based this conclusion. These cases involved defendants charged with both murder and rape. *See, e.g., Davis v. State,* 242 Ga. 901 (1979); *Westbrook v. State,* 242 Ga. 151 (1978); *Moore v. State,* 240 Ga. 807 (1978). Because of the similarity of these cases to the present case, the Court cannot hold that the imposition of the death penalty in this case is patently unjust. The petitioner's challenge to

the proportionality review conducted by the Georgia Supreme Court therefore must fail.

## XIV. GENERAL CONSTITUTIONAL CHALLENGES

In Counts 18, 19 and 21 of his petition, Bowen argues that the imposition of his death sentence violates his sixth and fourteenth amendment rights because 1) the death penalty is administered arbitrarily in Georgia, 2) the theoretical justifications for the death penalty are groundless, 3) the infliction of the death penalty has been repudiated by contemporary standards of decency, and 4) the means of imposing the death sentence, i.e. electrocution, inflicts unnecessary torture. The United States Supreme Court has rejected these arguments in *Zant v. Stephens*, — U.S. —, — S. Ct. —, 77 L. Ed. 2d 235 (1983); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Gregg v. Georgia*, 428 U.S. 153 (1976), and this Court is bound by these holdings. *See also Sullivan v. Dugger*, slip op. at 880 (11th Cir. Nov. 30, 1983); *Corn v. Zant*, 708 F.2d 549, 563 (11th Cir. 1983).

## XV. CONCLUSION

The petitioner is entitled to a new trial because the jury charge given during the guilt/innocence phase of his trial impermissibility shifted the burden of proving intent in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979), and because this error is not harmless beyond a reasonable doubt. The petitioner is also entitled to a new sentencing trial because 1) the traverse jury which sentenced him to death was drawn from an unconstitutionally composed jury pool, and 2) the prosecutor's closing argu-

ment during the sentencing trial went beyond the bounds of constitutional tolerance.

ACCORDINGLY, the petitioner's writ of habeas corpus is GRANTED subject to the State of Georgia's right to retry him within a reasonable period of time.

IT IS SO ORDERED, this 16th day of March, 1984.

/s/ Harold L. Murphy
UNITED STATES
DISTRICT JUDGE

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FOOTNOTES

1 The respondent filed out-of-time objections to the Magistrate's report. The petitioner has not responded to the submission of these objections. *See* Local Rule 91.2. Accordingly, the Court will include these objections in its consideration of this case.

2 Tr. refers to the transcript of the first trial of the petitioner.

3 Apparently, a record at the hospital existed which shows the drugs which were administered to the petitioner. This record was not, however, introduced into evidence at the trial, nor is it contained in the record evidence of this case.

4 On May 23, 1977 at approximately 5 p.m. Rufus Mitchell, who lived near the vacant house, discovered Young's body. He contacted Daniel Mitchell, who also lived in the area, and they called Sheriff Swafford. Rufus and Daniel Mitchell had seen the petitioner driving on a road near the vacant house at approximately 8:00 p.m. on May 22, 1977.

5 During the guilt/innocence phase of the petitioner's trial, a serologist testified that tests conducted on the petitioner's shoes revealed the existence of blood of human origin. *See* Tr. at 248.

6 Rt. refers to the transcript of the petitioner's second sentencing hearing.

7 SHC refers to the transcript of the state habeas corpus evidentiary hearing.

[8] The iodine bottle was recovered on May 25, 1977 and the washrag was recovered on May 26, 1977.

[9] These figures come from 1970 Census Bureau statistics. The respondent has not challenged the propriety of using such figures. *See Davis, supra,* at 1481 n. 2.

[10] FHC refers to the transcript of the federal habeas corpus evidentiary hearing.

[11] Because the Court holds that the petitioner is entitled to a new sentencing hearing based on the composition of the traverse jury pool, the Court will not address the petitioner's contentions that 1) the jury's inquiry about the availability of parole denied him a fair sentencing trial (Count 8), and 2) the trial judge's charges on aggravating and mitigating circumstances were constitutionally deficient (Counts 1 and 13).

[12] One item of evidence introduced during the guilt/innocence portion of the trial—Swafford's statement that Bowen had scratch marks on his body on May 24, 1977—would be suppressible, assuming both the inadmissibility of the May 24, 1977 confession and the admissibility of the May 25, 1977 confession. *See* Tr. at 155. The failure to suppress this evidence is error harmless beyond a reasonable doubt, however, in light of the Court's holding that the May 25, 1977 confession is admissible.

[13] It is clear that the procedures employed by Swafford and Evans when questioning Bowen on May 25, 1977—which included reading Bowen his *Miranda* rights—and the time which elapsed between the interviews conducted by Swafford and Evans on May 24, 1977 and May 25, 1977 eliminate the possibility that the confession given by Bowen on that day was the product of the May 24, 1977 confession, which this Court has assumed to be inadmissibel. *See Costello v. United States,* 365 U.S. 265, 278-80 (1960) (citing *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392 (1920)); *United States v. Lipscomb,* 435 F.2d 795, 801 (5th Cir. 1970), *cert. denied* 401 U.S. 980 (1971); *United States v. Ruffin,* 389 F.2d 76, 80 (7th Cir. 1968). *See* note 15 *infra.*

[14] Although lengthy, the *Parr* court's holding will be stated in full in this footnote due to its relevance to the voluntariness issue before the Court:

> Appellant . . . argues that his motion to suppress a written, incriminating statement made to the Secret Service on the night of his arrest should have been granted because the statement was not knowingly and voluntarily made.

[Appellant] contends that at the time of his arrest on October 21, 1981, he was unable to think clearly, to reason or to understand the nature of the federal agent's interrogation, due to excessive amounts of medication and an accident occurring on October 16, 1981, resulting in temporarily diminished mental capacity. He argues the signing of the written *Miranda* warning and waiver of his rights and his statement are not valid because they were not the product of a rational intellect.

Agent Tuller of the Secret Service testified that he he arrested Appellant Parr on October 21 outside the Hour Quick Print Shop, and at that time read appellant his *Miranda* rights. Agent Tuller also testified that at that time Parr indicated that he understood those rights. Parr then was transported to the Secret Service station, where he again was advised by Tuller of his rights. Appellant next executed a Warning and Waiver of Rights to which the defense stipulated at trial. He then made an incriminating statement that was reduced to writing and signed by him. During the motion to suppress hearing, Parr took the stand, acknowledged his signature on the waiver form and the written statement, remembered signing the forms but did not remember Agent Tuller going over the form and the statement with him as Agent Tuller had testified that he did. Parr also testified that he did not recall having his rights read to him.

In *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966), the Supreme Court held that evidence obtained as a result of a custodial interrogation is inadmissible unless the defendant had first been warned of his rights and knowingly waived those rights. *See Sullivan v. Alabama*, 666 F.2d 478, 482 (11th Cir. 1982). Where, as here, interrogation continues in the absence of counsel for the defendant, the government must show that the defendant made a knowing, voluntary, and intelligent waiver of his rights. *Miranda v. Arizona*, 384 U.S. at 475; *Sullivan v. Alabama*, 666 F.2d at 483.

Whether a valid waiver of constitutional rights is made is a question of law on which an appellate court must make an independent judgment, *Beckwith v. United States*, 425 U.S. 341, 348 (1976); *Davis v. North Carolina*, 384 U.S. 737, 741-42 (1966), based on the totality of the circumstances. *Blackburn v. State*, 361 U.S. 199, 206 (1960). See also *North Carolina v. Butler*, 441 U.S. 369 (1979); *Sullivan v. Alabama*, 666 F.2d at 482-83.

Viewing the totality of the circumstances here the district court did not err in refusing to suppress the written statement. Agent Tuller testified that *Miranda* warnings were at least twice given to the appellant. Appellant testified only that he did not remember. The government elicited testimony from Agent Tuller that at the time of the warnings and appellant's written statement ,appellant "appeared to be fully coherent of what was going on" and "appeared to have his mental faculties about him." His speech was normal, he complained of no illness and he walked without difficulty. Donna Oles testified that on October 16 Parr told her he had been hit by a car. She took him to a doctor that day and a hospital the next. On the 19th, after the fire at Parr's house, he complained of dizziness and she took him to another hospital. Oles testified that on several occasions during this period, she observed Parr punch himself behind his left ear and heard him state that if it was not red he would make it red and that he felt sick even if they did not think he was sick. Parr and Oles testified that commencing on October 12 Parr had been taking prescription medicine, prescribed to relax his nerves and help him sleep. The pharmacist testified to filling the prescription for Dalmane and Centrax on October 12. On October 16 the prescription was refilled. Parr, although stating he remembered little of what had transpired during the period between October 12 and October 21, 1981, testified that he thought he recalled taking most of his medication on the 16th, possibly some on the 17th, but if any was left he may have taken it on the 21st, the day of his arrest. Oles testified, however, that Parr had worked three or four hours in the print shop on the 21st and seemed "very alert" and "his manner of speaking was very well on the 21st."

While the conduct of the accused is only one factor in evaluating the validity of a waiver, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Sullivan v. Alabama*, 666 F.2d at 483, here there is not only the testimony of a government agent that appellant was read his rights, and made the statement in question, but there exist signed copies of both the waiver and the statement. Furthermore, appellant's own testimony establishes that to the best of his memory he had taken all of the medication allegedly contributing to his temporarily diminished mental capacity on the 16th of October, and perhaps some on the 17th, a full four to five days before his arrest and the making of the statement. All of these factors were taken into ac-

> count by the district court in denying the motion to suppress the written statement. In addition the district court was able, as we are not, to evaluate the credibility of the witnesses at the motion to suppress hearing.
>
> Accordingly, after reviewing the record, we agree with the district court that Parr made a knowing, voluntary, intelligent waiver of his constitutional rights.

*Parr, supra,* at 817-18.

15 The United States Supreme Court recently granted certiorari in a tainted-confession case. *See Oregon v. Elstad,* 61 Or. App. 673, 658 P.2d 552 (1983), *cert. granted,* 34 CrL 4213 (March 7, 1984). The decision in *Elstad* may effect the confession issue analysis in this case.

16 *But cf. California v. Ramos,* — U.S. —, 103 S. Ct. 3446 (1983) (jury instruction regarding the possible commutation of a sentence of life imprisonment without parole is permissible).

17 In *Sandstrom* the court held that the following charge impermissibly shifted the burden of proof: "the law presumed that a person intends the ordinary consequences of his voluntary acts." *Id.* at 513. It did so because "the defendant's jury may have interpreted [this charge] as constituting either a [mandatory] burden-shifting presumption [which did not specify the burden of production placed on Sandstrom] . . . or a conclusive presumption." *Id.* at 514-24. The Supreme Court has indicated that a mandatory presumption is not burden shifting of production—e.g. being satisfied by 'any' evidence —" on a defendant. *Ulster County Court v. Allen,* 442 U.S. 140, 157 n. 16 (1978).

18 In his charge, the trial judge later defined "reasonable satisfaction" as follows:

> Reasonable satisfaction is not to be construed as requiring the accused person to prove insanity beyond a reasonable doubt but only the jury's reasonable satisfaction and irrespective of any technical rules of a plea of insanity whether an act was caused by a diseased mind is to be determined primarily from the indicia presented by the act itself.

*Id.* at 464.

19 "It is well established that '[i]n determining the effect of [an] instruction on the validity of [a] conviction, . . . a single instruction may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Lamb v. Jernigan,* 683 F.2d 1332, 1339 (11th Cir. 1982)

(quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)), *cert. denied*, — U.S. —, 103 S. Ct. 1276 (1983).

20 The United States Supreme Court has granted certiorari in a case from the Court of Appeals for the Sixth Circuit which involves four issues: whether a *Sandstrom* error constitutes harmless error; whether *Sandstrom* should be applied retroactively; whether th eappellant-defendant's failure to object to the *Sandstrom* charge at trial precludes collateral review of the alleged *Sandstrom* error; and whether the question of the retroactive application of *Sandstrom* is properly before the United States Supreme Court. *See Koehler v. Engle*, 707 F.2d 241 (6th Cir.) *cert. granted*, — U.S. — (1983). *See generally* 34 CrL 4185 (Feb. 15, 1984). The *Koehler* case has not been decided by the Court, although it has heard oral argument on the issues mentioned above. *See id.* 4216-17 (March 7, 1984). The decision in *Koehler* may effect the outcome of the *Sandstrom* issue in this case.

21 Because the Court holds that the petitioner is entitled to a new trial due to the *Sandstrom* error, the Court will not address the issues 1) whether Bowen's trial counsel rendered constitutionally effective assistance of counsel (Count 3), and 2) whether the grand jury which indicted Bowen and the traverse jury which convicted him were unconstitutionally composed (Counts 10 and 11). The Court notes that the resolution of these issues is far from clear at this time. *See generally Birt v. Montgomery*, slip op. (11th Cir. Feb. 13, 1984).

22 In his Report and Recommendation the Magistrate addressed the issue whether several venirepersons were improperly excused from the jury pool under *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The petitioner has not, however, raised such a contention. Even if the petitioner did raise such an argument, it is without merit. *See McCorquodale v. Balkcom*, slip op. (11th Cir. Dec. 20, 1983); *Brooks v. Francis*, 716 F.2d 780, 794-95 (11th Cir. 1983); *Corn v. Zant*, 708 F.2d 549, 564-65 (11th Cir. 1983); Tr. 11-13, 24-25, 32-33; Rt. 10-15, 32-33.

23 *See generally Moore v. Zant*, 722 F.2d 640, 648-49 (11th Cir. Dec. 20, 1983); *Cox v. Montgomery*, 718 F.2d 1036, 1038 (11th Cir. 1983); *Westbrook v. Zant*, 704 F.2d 1487, 1494-97 (11th Cir. 1983).

24 Furthermore, the petitioner had the opportunity to present any evidence at the federal habeas corpus evidentiary hearing that he wished to present during the state habeas corpus evidentiary hearing, as he is proceeding in forma pauperis in this Court.

## APPENDIX B

Charlie Benson BOWEN,

Petitioner-Appellee,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center,

Respondent-Appellant.

No. 84-8327.

United States Court of Appeals,
Eleventh Circuit.

Aug. 6, 1985.

State prisoner who had been convicted of rape and murder filed petition for writ of habeas corpus. The United States District Court for the Northern District of Georgia, Harold L. Murphy, J., granted writ, and an appeal was taken. The Court of Appeals, Fay, Circuit Judge, held that: (1) state trial court's charge to jury during culpability phase of capital case improperly shifted burden of proof on element of intent, but error was harmless in view of overwhelming evidence that 12-year-old victim, whose nude body was found beside a bloodied mattress in a vacant house, having been stabbed 14 times about the face, chest, and abdomen, was intentionally killed, and in view of fact that defendant, by relying exclusively on an insanity defense, had effectively conceded issue of intent; (2) both prosecutor's statement of his personal opinions during final argument in sentencing hearing and his suggestion that a "noted justice" believed that mercy was an inappropriate consideration for defendant were im-

proper, but did not result in a fundamentally unfair trial; but (3) jury which sentenced defendant to death was drawn from an unconstitutionally composed traverse jury list in view of statistical disparity of minus 22.7% between percentage of women residing in county and percentage of women on jury list and in light of fact that jury commissioners' denials of discrimination were insufficient to dispel inference of intentional discrimination arising from showing that traverse jury selection process contained potential for abuse.

Affirmed in part, reversed in part, and remanded.

Johnson, Circuit Judge, specially concurred in part, dissented in part, and filed an opinion.

George C. Young, District Judge, sitting by designation, concurred in part, dissented in part, and filed an opinion.

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Susan V. Boleyn, Asst. Atty. Gen., and William B. Hill, Jr., Atlanta, Ga., for respondent-appellant.

Paul H. Kehir, Atlanta, Ga. (Court-appointed), for petitioner-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY and JOHNSON, Circuit Judges, and YOUNG*, District Judge.

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* Honorable George C. Young, U.S. District Judge for the Middle District of Florida, sitting by designation.

FAY, Circuit Judge:

Petitioner, Charlie Benson Bowen, was convicted by a jury in Polk County, Georgia, of rape and murder. He was sentenced to life imprisonment for the rape charge and to death for the murder charge. Having exhausted his state court remedies, Bowen filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent, Ralph Kemp, Warden, Georgia Diagnostic and Treatment Center, appeals the district court's grant of the writ.

Respondent raises three issues on appeal: (1) whether the district court erred in holding that the state trial court's charge to the jury during Bowen's culpability trial improperly shifted the burden of proof on the element of intent, in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and was not harmless beyond a reasonable doubt; (2) whether the district court erred in holding that the prosecutor's closing argument during the sentencing phase of Bowen's trial rendered that phase fundamentally unfair; and (3) whether the district court erred in finding that Bowen was entitled to a new sentencing trial since the sentencing jury was drawn from an unconstitutionally composed traverse jury list. We affirm the district court's jury composition ruling and reverse the district court's rulings on the *Sandstrom* and prosecutorial argument issues.

## I. PROCEDURAL HISTORY

Bowen was indicted in Polk County, Georgia, on charges of raping and murdering a twelve-year old girl.[1]

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1. For a detailed discussion of the historical facts in this case, see *Bowen v. State*, 241 Ga. 492, 246 S.E.2d 322 (1978).

The trial jury found him guilty on both counts, and pursuant to Georgia's bifurcated trial procedure, a jury thereafter sentenced him to life imprisonment for rape and to death for murder. On direct appeal, the Georgia Supreme Court affirmed the underlying convictions and rape sentence. The death sentence, however, was set aside and the case was remanded solely for resentencing on the murder conviction. *Bowen v. State,* 241 Ga. 492, 246 S.E.2d 322 (1978).

In September of 1978, a Polk County jury again sentenced Bowen to death. The Georgia Supreme Court affirmed, *Bowen v. State,* 244 Ga. 495, 260 S.E.2d 855 (1979), and the United States Supreme Court denied certiorari. *Bowen v. Georgia,* 446 U.S. 970, 100 S.Ct. 2952, 64 L.E.2d 831 (1980).

Bowen then filed a petition for a writ of habeas corpus in the Superior Court of Butts County. The writ was denied, as was his application to the Georgia Supreme Court for a certificate of probable cause to appeal that denial. The United States Supreme Court again denied certiorari. *Bowen v. Zant,* 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed2d 692 (1982).

Bowen thereafter sought habeas relief in the United States District Court for the Northern District of Georgia. An evidentiary hearing was held before the United States Magistrate, who recommended that relief be limited to granting Bowen a new sentencing trial on the murder conviction. The district court agreed on this point, but went further; it also held that (1) the jury charge given during the guilt phase of Bowen's trial impermissibly shifted the burden of proving intent, in violation of *Sandstrom,* and that this error was not harmless beyond a reasonable

doubt, and (2) the prosecutor's closing arguments during the sentencing hearing rendered that phase of Bowen's trial fundamentally unfair.

II(a) THE SANDSTROM ISSUE

Bowen asserts that the following jury instruction impermissibly shifted the burden of proof on the element of intent, in violation of *Sandstrom:*

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the tryor [sic] of facts, that is you the jury, may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted.

We agree.

The Supreme Court, in *Franklin v. Francis,* — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), held that a portion of a jury charge virtually identical to the one at issue here "undeniably created an unconstitutional burden-shifting presumption with respect to the element of intent." *Id.* at —, 105 S.Ct. at 1973. The Court also rejected the state's argument, identical to the one advanced by respondent in the instant case, that any technical infirmity in the challenged instruction was sufficiently cured by clarifying language found elsewhere in the charge. *Id.* at — - —, 105 S.Ct. at 1972-77. "[B]ecause the charge read as a whole does not explain or cure the error, we hold that

the jury charge does not comport with the requirements of the Due Process Clause." *Id.*, at —, 105 S.Ct. at 1977. The district court did not err in finding that the instruction violated *Sandstrom.*

II(b) HARMLESS ERROR

The Supreme Court has not yet determined "whether an erroneous charge that shifts a burden of persuasion on essential element of an offense can ever be harmless." *Id.* We recognize, however, that four members of the Supreme Court have suggested that a jury instruction violating *Sandstrom* cannot be considered harmless error except in "rare situations." *Connecticut v. Johnson,* 460 U.S. 73, 87, 103 S.Ct. 969, 977, 74 L.Ed.2d 823 (1983) (plurality opinion). Since this position has yet to command a majority of the Court, we continue to apply the harmless error analysis in the *Sandstrom* context, as we do with most other errors of constitutional significance. *See Tucker v. Francis,* 762 F.2d 1496, 1501 (11th Cir.1985) (en banc); *Davis v. Kemp,* 752 F.2d 1515, 1521 (11th Cir. 1985) (en banc).

The *Davis* Court fleshed out the contours of the harmless error inquiry as it relates to a *Sandstrom* violation. *Davis* recognized that this circuit has identified two situations where the harmless error rule can be invoked. Harmless error analysis is proper "if the evidence was overwhelming as to the defendant's guilt and if the instruction was applied to an element of the crime which was not at issue at the trial." *Id; accord, Tucker,* 762 F.2d 1502; *Brooks v. Francis,* 762 F.2d 1383, 1390 (11th Cir.1985) (en banc). *Davis* further states that with re-

spect to the first situation, the court's analysis should "focus on whether evidence of *intent,* rather than the more inclusive issue of *guilt,* is overwhelming." *Tucker,* 762 F.2d 1502 (emphasis in original) (citing *Davis,* 752 F.2d at 1521 & n. 10). In this regard, the nature of the defense asserted at trial may be an important factor. *See Brooks,* 762 F.2d 1390.

A reading of *Davis* and its progeny reveals that when a court focuses on the degree of evidence of intent, it should examine the evidence without reference to the particular defendant. In other words, the court should examine the evidence as if the allegedly criminal conduct had been performed by some anonymous actor. For example, in *Davis,* where the defense essentially was non-involvement, the Court examined the circumstances of the victim's death and concluded "that whoever killed the victim did so with intent and malice." *Davis,* 752 F.2d at 1521. In *Tucker,* another non-involvement defense case, the Court reasoned that the evidence was overwhelming that whoever killed the victim did so intentionally because "the victim died of one crushing blow to the skull by a blunt instrument." *Tucker,* 762 F.2d 1503. A similar tack was taken in *Brooks,* a case in which the defendant asserted accident as his defense. In holding the *Sandstrom* violation to be not harmless beyond a reasonable doubt, the *Brooks* Court emphasized that the evidence of intent was not overwhelming because of the manner in which the victim was killed. *Brooks,* 762 F.2d 1391-93 & n. 14,

Using this approach, we conclude that the evidence of intent to kill Sheila Denise Young, the victim in this case, was overwhelming. The child's nude body was found beside a bloodied mattress in a vacant house. She had

been stabbed fourteen times about the face, chest and abdomen, and died because of loss of blood. Her death obviously was not the result of accident, mistake, or negligence, but rather was the result of an "intentional" act.

Moreover, Bowen, in a very real sense, conceded the issue of intent. In discussing those "rare situations" where the *Connecticut v. Johnson* plurality might employ the harmless error rule, Justice Blackmun stated:

> [A] *Sandstrom* error may be harmless if the defendant conceded the issue of intent. *See, e.g., Krzeminski v. Perini,* 614 F.2d 121, 125 [6th Cir.], cert. denied, 449 U.S. 866 [101 S.Ct. 199, 66 L.Ed.2d 84] (1980). See also *Washington v. Harris,* 650 F.2d 447, 453-54 [2d Cir.1981], cert. denied, 455 U.S. 951 [102 S.Ct. 1455, 71 L.Ed.2d 666] (1982). *In presenting a defense such as* alibi, *insanity,* or self-defense, *a defendant* may in some cases *admit that the act alleged by the prosecution was intentional,* thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless.

*Connecticut v. Johnson,* 460 U.S. at 87, 103 S.Ct. at 978 (emphasis added). Bowen's sole defense at trial was insanity; he never denied that he repeatedly stabbed Shelia Denise Young. By relying exclusively on an unsound mind defense, Bowen effectively conceded that if his defense were not accepted, it could not be gainsaid that his acts were anything but intentional.

The instant case is readily distinguishable from *Engle v. Koehler,* 707 F.2d 241 (6th Cir.1983), *aff'd by an equally divided Court,* — U.S. —, 104 S.Ct. 1673, 80 L.Ed.2d 1 (1984) (per curiam), a factually similar case relied upon by the en banc Court in *Davis.* The defendant in *Koehler*

was convicted of first degree murder. His "sole defense was temporary insanity because of the effects of alcohol, drugs and dissociative reaction." *Koehler,* 707 F.2d at 243. The Sixth Circuit found that a *Sandstrom* burden-shifting instruction was not harmless error beyond a reasonable doubt, and therefore granted habeas relief. *Id.* at 246. The court reasoned that the *Sandstrom* violation was not harmless because the evidence concerning the defendant's lack of *mens rea* defense was conflicting. *Id.*

The similarity between the instant case and *Koehler* ends, however, with the *Sandstrom* violations and the defenses asserted. The instruction condemned in *Koehler* stated that "*the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts.*" *Id. at* 243 (emphasis in original). The clear import of this instruction is that the presumption applies to *all* persons, whether sane or not. In the instant case, however, the offensive presumption would not become operative unless and until the jury found that Bowen was "a person of *sound mind* and discretion." In other words, if the jury accepted Bowen's insanity defense, and he thus was considered a person of unsound mind, the jury could *not* presume that he intended the natural and probable consequences of his acts.[2] But the jury did not accept Bowen's

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2. Apart from the language of the challenged instruction, other instructions in the trial court's charge make it clear that acceptance of Bowen's insanity defense would preclude resort to the offensive presumption. After instructing the jury on Bowen's insanity defense (Bowen does not challenge these instructions and we therefore assume they were proper), the court stated:

(Continued on following page)

defense. Consequently, the jury conceivably could have relied on the "mandatory rebuttable presumption." By that point, however, Bowen's sole defense already had fallen by the wayside, and intent no longer was a viable issue in the trial.

*Franklin v. Francis*, 720 F.2d 1206 (11th Cir.1983), *aff'd*, — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), is instructive by way of comparison. In *Franklin*, the court found that an instruction identical in all material respects to the one at issue here violated *Sandstrom*. The court held that the error was not harmless since the facts did not overwhelmingly preclude the defendant's accident defense. The court reasoned: "A presumption that Franklin intended to kill *completely eliminated his defense* of 'no intent.'" *Franklin*, 720 F.2d at 1212 (emphasis added).

The lesson of *Franklin* is clear: A *Sandstrom* violation will not be deemed harmless if the presumption works

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(Continued from previous page)

> *[I]f you find that the defendant did not have reason sufficient to distinguish between right and wrong,* as I have instructed you, at the time of the commission of the alleged offense . . ., that *would be an end to your consideration of the case and you would stop at that point* and enter a verdict that would reflect that finding.

Tr. at 463 (emphasis added).

In the next paragraph of its charge, the court instructed the jury:

> If, however, from a consideration of the evidence *you determine that* at that time and place of the occasion under investigation in this trial that *the defendant was sane* and thus responsible in such event *you would proceed to consider the other portions of the charge that I have given you,* or am about to give you.

*Id.* (emphasis added).

to deprive the defendant of an asserted defense that is plainly at issue. Here, unlike the situation in *Franklin,* the defendant's sole defense had been "completely eliminated" before the proscribed presumption could have become operative. *Cf. Connecticut v. Johnson,* 460 U.S. at 98 n. 6, 103 S.Ct. at 983 n. 6 (Powell, J., dissenting) ("The question of intent is one of fact and . . . before a jury even reaches the presumption instruction it must find facts that are a predicate for the presumption.").

Based on the foregoing, we hold that it is beyond a reasonable doubt that the *Sandstrom* error in this case did not contribute to Bowen's murder conviction. The error was harmless and we therefore reverse the district court's holding to the contrary.

## III. PROSECUTORIAL ARGUMENT

Bowen challenges portions of the prosecutor's closing argument during the sentencing phase of his trial. Bowen argued in his petition filed in the district court that the following passage improperly raised the possibility that he might be paroled from a life sentence:

> [The Prosecutor]: And now we come up here with this idea that here is a man that even though he knew that he himself . . . even though he was convicted in his own heart and he desired to die and we are approached with the proposition that he is subject to be rehabilitated and released back into society.
>
> Yeah, I guess he can be rehabilitated. Hitler could have been. I believe in about six or eight months if I'd had him chained to a wall and talked to him and beat him on one side of the head for a while with a stick telling him you believe this don't you then beat him on the other side with a stick telling him you believe that don't you I believe I could have rehabilitated Hitler.

> Yeah, it's conceivable that he could come back into society. It's conceivable that he can go back to work at Goodyear Mills in the twister room. Yeah, it's conceivable that he can go see Angie some more. Yeah, it's conceivable that he can be let out to gamble, it's conceivable that he can be let out to drink his beer and smoke his marijuana, and it's conceivable that he could pick up another little twelve year old girl, if you want him to all you've got do do is . . .
>
> [Defense Counsel]: I'm going to object to this line or [sic] argument. Your honor, I think this is going beyond the bounds of a fair argument and I suggest that he be directed to cease from that.
>
> The Court: I overrule your objection.
>
> [The Prosecutor]: They say he can come back into society. Some of them would welcome him with open arms but I'm not. They can call me what they wish, unchristian or whatever they want to. I'm not willing to. I'm willing to abide by your determination because it's a determination you must make.

Tr. at 576-77.

The district court, on the basis of this and other statements made by the prosecutor in his closing argument which will be discussed below,[3] held that Bowen's sen-

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3. In his habeas petition, Bowen specifically contested only the prosecutorial argument quoted *supra* in the text. This also was the only argument objected to by trial counsel in the sentencing hearing. The district court, however, examined the challenged argument in light of the prosecutor's entire closing. In the court's view, the challenged argument, when considered with other arguments the court found objectionable, rendered the sentencing hearing fundamentally unfair. Because the district court considered arguments which were not objected to at trial, and respondent does not contend here that that consideration was improper, we find it appropriate to address all the arguments the district court regarded as improper.

tencing trial was rendered fundamentally unfair. We disagree.

The law is clear that habeas relief will not be given for improper prosecutorial arguments unless those arguments rendered the sentencing proceeding "fundamentally unfair." *Donnelly v. DeChristoforo,* 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974); *see Brooks,* 762 F.2d 1400; *Tucker,* 762 F.2d 1504; *Drake v. Francis,* 762 F.2d 1449, 1457-1458 (11th Cir.1985) (en banc). To make that determination, the reviewing court must decide whether there is a reasonable probability that, had the remarks not been made, the sentencing outcome would have been different. *Brooks,* 762 F.2d 1402 (citing *Strickland v. Washington,* 466 U.S. 668, —, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984)).

As an initial matter, we interpret the content of the argument quoted above as more a comment on Bowen's future dangerousness and prospects for rehabilitation than an injection of the possibility of parole into the sentencing hearing. Throughout the sentencing hearing, defense counsel attempted to portray Bowen as a person who converted to Christ after his incarceration for killing Shelia Denise Young. For example, J.D. Bryant, a deputy sheriff with the Polk County Sheriff's Department, was called to testify on behalf of Bowen. Bryant worked at the jail where Bowen had been housed since his arrest. Bowen's counsel specifically asked Bryant if he had "any opinion regarding [Bowen's] potential for rehabilitation and return to society." Tr. at 278. Bryant, a Baptist minister, testified that in his opinion, Bowen truly had experienced a religious conversion and now was a "model

individual" who "could participate in society and become a useful member of society." *Id.*

The en banc court has made it clear that consideration of future dangerousness "is a proper element in the sentencing jury's decision." *Brooks,* 762 F.2d 1412. "Similarly, . . . the jury may appropriately consider whether [the] defendant is . . . so unlikely to be rehabilitated that incapacitation is warranted" *Id.* at 1407. The prosecutor therefore did not act improperly when he attempted to nullify Bowen's characterization of himself as a person who was fully rehabilitated as a result of a recent spiritual metamorphosis.

We nonetheless agree with the district court that the challenged argument improperly stated the prosecutor's personal opinion regarding Bowen's potential for rehabilitation. The Supreme Court, in a related context, recently stated:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its view of the evidence.

*United States v. Young,* — U.S. —, 105 S.Ct. 1038, 1048, 84 L.Ed.2d 1 (1985). Additionally, "[a]n attorney's person opinions are irrelevant to the sentencing jury's task." *Brooks,* 762 F.2d 1408.

It is clear that the Hitler analogy was an improper statement of the prosecutor's personal opinion regarding Bowen's rehabilitative potential. Similarly, the prosecutor's personal feelings concerning Bowen's possible return to society were irrelevant and improperly put before the sentencing jury.

The district court also condemned the following arguments made by the prosecutor: "If you [the jury] want him [to return to society as a rehabilitated man] fine, but I don't want him in my society;" Tr. at 564; "I wish [Bowen] had woke up dead." *Id.* at 575. Although these statement of the prosecutor's personal opinion regarding statements arguably advocate the appropriateness of retribution, a penological justification for the death penalty which is properly considered by the jury, *Brooks*, 762 F.2d 1406-1407, the fact remains that they were couched in the form of personal opinions. These arguments therefore also were improper.

The district court took issue with the prosecutor's characterization of Bowen as "a product of the devil," Tr. at 565, "a liar," *id.* at 567, who was "no better than a beast." *Id.* at 569. We address these in turn.

With respect to the first of these remarks, we note that the prosecutor was not referring specifically to Bowen, but rather was commenting on the insanity defense in general. The prosecutor was simply making the point that not all perpetrators of heinous crimes are insane and that society has "gotten away from the old time idea that [a defendant can commit a vicious crime] because [the defendant is] a product of the devil, and [the defendant commits the crime] because [he does not] care." *Id.* at 565.

Although dramatic, we do not view this argument as improper.

We also do not regard the prosecutor's statement that Bowen was a liar as improper. When the term was used, the prosecutor was arguing to the jury that Bowen did not act like a person who was disoriented and out of touch with reality when he killed Shelia Denise Young. The prosecutor argued that Bowen tried to cover up the fact that he had attacked his own daughter shortly before the crimes for which he was convicted. The prosecutor stated: "But he wanted to hide the fact it was him. If he was out of touch with reality what did it matter. He'd say why sure, I did that. No, he lied to his wife about it and he lied to everybody about it. . . ." *Id.* at 567. The prosecutor's argument has ample support in the record and is not improper.

The reference to Bowen as "no better than a beast" was made as part of an argument that Bowen, who apparently attempted to commit suicide shortly after he attacked his daughter, himself believed that he should forfeit his life for attacking his own flesh and blood. This reference was supported by the evidence and was not improper. *See Tucker,* 762 F.2d 1507 (description of defendant as "less than human" not improper where supported by the evidence).

The following argument also was censured by the district court: "We are living in the days of Cain and the voices heard are Abel's crying out to us all the time the voices of the murdered cry out. . . . To whom do they call? The can only call to the ministers of the law for recompense or vengence [sic]. . . . As a juror, you are a mini-

ster of the law. The only place Shelia Denise Young has to appeal to is you." Tr. at 578-79. This argument was, in our view, not improper.

"It is completely appropriate to remind the jury of the importance of its sentencing decision." *Tucker,* 762 F.2d 1508. This is precisely what the prosecutor did here, albeit in rather colorful prose. He did not argue that any future victim of Bowen would be on the jury's conscience, nor did he state that the jurors were the only persons who could stop Bowen from killing again. *See id.* at 1508. Rather, the prosecutor was bringing home the point that the jurors were the only "ministers of the law" able to exact appropriate retribution from the slayer of Shelia Denise Young. This was proper argument. *Cf. Brooks,* 762 F.2d 1412 ("The reminder to the jury that 'the buck stops with you today' was an appropriate reference to the fact that the jury must make the ultimate decision.").

The final argument the district court relied upon to invalidate the sentencing hearing went as follows: "You know for a criminal to go without proper punishment is a disgrace to the society we live in and it's shown to us every day by the fruits that we reap from day to day in our society when we have the bloody deeds such as this appear to be an improper argument. When read in context, however, it is clear that the prosecutor was giving his watered-down rendition of an argument found improper by the en banc Court in *Drake,* 762 F.2d 1449.[4]

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4. The *Drake* court found the following argument "extremely improper." *Drake,* 762 F.2d 1458:

(Continued on following page)

Immediately before the challenged argument the prosecutor stated:

> You know *one of our noted justices* once said that the sickly sentimentality that causes us to shirk whenever the axe of justice is about to fall that it is not true sentimentality, that it cannot produce true jus-

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If your Honor please, in connection, in my urging you to submit this to the jury, the State of Georgia, the Supreme Court of Georgia in *Hawkins v. State*, in 25 Ga., page 207, the Court, in upholding the murder and the death sentence in that case said this: "Human life is sacrificed at this day throughout the land with more indifference than the life of a dog, especially if it be a good dog." They went on to hold that Cain was the first murderer, but who was the last is known only to those who have read this morning's papers. And they said, "If this crime goes unpunished, let our skirts at least be free from the stain of blood guiltiness."

If your Honor please, in *Eberhart v. State*, 47 Ga. [598], page 610, the Justice of the Supreme Court of Georgia said this, in connection with the death sentence for murder:

"We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at last about to suffer for a crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished, and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society." The Court went on to say, "We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist on mercy to society." And if your Honor please, the Court went on to hold, and in that case, that for criminals to go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which the bloody deed occurs. They said that a "stern, unbending, unflinching administration of the penal laws, without regard to position or sex, that it is the highest mark of civilization, and it is also the surest mode to prevent the commission of offenses.

*Id.*

> tice, that it may be the sign of a tender heart but it is also a sign of one not under proper regulation.
>
> Now, society, *this is in the words of a justice,* demands that crime be punished for criminal deeds and false humanity starts and shudders when the axe of justice is ready to strike is a dangerous element to peace and society. *That's true today. Justice as it has been for years and years.*
>
> Now we've had too much of this and it's not true. We must insist on mercy for society and not always look to the criminal convicted of hideous, monstrous, vile, outrageous acts.

Tr. at 579 (emphasis added). Immediately after the challenged argument, the prosecutor stated:

> But do you know what it would take to stop it, a stern, unbending, unflinching administration of the law, stern punishment by people who stand for something, are willing to stand up and fulfill the commands of the law.

*Id.* at 579-80.

In light of *Drake,* we conclude that this argument was improper. Although the prosecutor did not specifically invoke the Supreme Court of Georgia to abjure mercy, as was the case in *Drake,* he did attribute to a "justice" the view that opting for mercy was frowned upon. The argument was not as prejudicial as the one challenged in *Drake, see infra* note 5, yet nonetheless was improper.

We have identified two types of improper prosecutorial argument at Bowen's sentencing trial: (1) the prosecutor's statements of his personal opinions; and (2) the prosecutor's suggestion that a "noted justice" believed that mercy was an inappropriate consideration for Bowen. Because

the improper arguments focused in the main on Bowen's rehabilitative prospects and the propriety of mercy, we conclude that they did not influence the jury's finding of aggravating circumstances. Indeed, Bowen does not even contend that the argument found improper by the district court affected the jury's finding that the murder was horrible or inhuman because it involved torture. *See* Ga. Code Ann § 17-10-30(b)(7); Tr. at 613. Therefore, under Georgia law, Bowen was eligible for the death penalty.

That, however, does not end the inquiry. As we have seen, *see supra* pp. 678-79, the recent en banc decisions of this Court instruct that to determine whether improper arguments rendered a sentencing trial fundamentally unfair, we should ask whether there is a reasonable probability that, in the absence of those arguments, the death penalty would not have been impose. *See, e.g., Brooks,* 762 F.2d 1402, 1413. "This inquiry involves an evaluation of the improper remarks in the context of the entire proceeding. . . ." *Id.* at 1413.

The prosecutor improperly put before the jury his personal opinions. The principal thrust of his argument, however, made it clear that only the jury could decide whether or not Bowen should be executed. The prosecutor began his argument by stating that "it is necessary that you twelve jurors decide what punishment [Bowen] is to receive for the offense of murder." Tr. at 560. Further along in his argument the prosecutor conceded that "I'm willing to abide by your [the jury's] determination because it's a determination you [the jury] must make." Tr. at 577. He also said that "[t]he only place that Shelia Denise Young has to appeal to is you [the jury]." *Id.*

at 579. Thereafter, the prosecutor specifically advised the jury that "in order to fulfill the commands of the law in this case you do whatever you wish" *Id.* at 580. The prosecutor concluded his argument by exhorting the jurors to search their consciences and souls and return a verdict of death, yet recognized that "[t]hat's a decision you [the jury] must make." *Id.* at 581.

The trial judge's instructions also made it abundantly clear that no one save the jury was responsible for the ultimate decision, life or death for Bowen. In the first paragraph of his charge, the judge instructed the jury that "[y]ou [the jury] have been empowered to fix the punishment for the offense for which [the defendant] has already been convicted." *Id.* at 605. In the next paragraph, the judge charged that the jurors "are the judges of the law and facts of this case. . . . You are made the exclusive judges as to the credibility of witnesses." *Id.* The judge also charged the jury that even if the state proved the existence of an aggravating circumstance, the jury "would [still] be authorized to fix the punishment of the defendant at life imprisonment." *Id.* at 609. The judge further instructed that the verdict forms "are not in any manner to suggest to you what your verdict should or should not be. That is entirely up to you." *Id.* at 610.

In these circumstances, we have little difficulty concluding that the jury understood that it bore sole responsibility for the sentencing decision and that the prosecutor's opinions were no more than that. The improper statements of opinion were fairly isolated within the body of the prosecutor's argument, and represented only a small part thereof. Any prejudice from the improper remarks was for the

most part alleviated by other statements of the prosecutor and the judge's charge. We find no reasonable probability that, absent the improper statements of opinion, Bowen would not have been sentenced to death.

Similarly, we hold that there is no reasonable probability that the prosecutor's invocation of the views of a "noted justice" changed the outcome of the sentencing hearing. First, as previously noted, the thrust of the prosecutor's own argument made it unmistakenly clear that the jury could do as it pleased. Bowen's counsel also emphasized the fact that, under Georgia law, the jury could opt for life rather than death, even if it found the existence of an aggravating circumstance, after considering all the circumstances. *See id.* 600-01 ("[E]ven if you find that this was a vile heinous act you still have the option because of considering the man of awarding that man a life sentence instead of a death sentence"); *id.* at 602 ("[I]f you consider the true Charlie Bowen . . . as the evidence really pictures him, . . . then . . . you have the opportunity to award him a punishment of life in prison rather than being put to death, even for the offense of murder"); *id.* at 604 ("[T]he law doesn't say you've got to put a man to death because he murdered somebody and I don't think Charlie Bowen deserves death and . . . there's evidence here to show you that he doesn't deserve death"). Most importantly, the trial judge, when instructing the jury on mitigating circumstances, advised the jury that mitigating circumstances do not justify or excuse the offense, "but . . . in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability." *Id.* at 607. The judge also charged the jury that despite the presence of aggravating circumstances, it could fix the punishment

of Bowen at life imprisonment "for any reason that is satisfactory to you [the jury]." *Id.* at 609. The court further instructed the jury that their decision should be informed by "consideration [of] all the evidence, all the surrounding facts and circumstances, and the law as given you . . . by the court." *Id.* at 610. Finally, as we stated in our discussion of the improper statements of personal opinion, the trial court made it very clear to the jurors that it was entirely up to them whether or not Bowen should be given a death sentence.[5]

The improper argument suggesting the judicial disapproval of mercy does not undermine our confidence in the outcome of the sentencing hearing. We accordingly

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5. This case is easily distinguished from *Drake*, where the improper argument was found to have rendered the sentencing hearing fundamentally unfair. As an initial matter, a comparison of the argument in *Drake* and the argument made in the instant case, reveals that the latter argument is a more limited, if not rather garbled, version of the former. The prosecutor in *Drake* specifically invoked the office of the Supreme Court of Georgia in support of his argument. *See supra* note 4; *Drake*, 762 F.2d 1458. Here, the prosecutor referred only to a "noted justice." The prosecutor in *Drake* specifically stated that the Supreme Court of Georgia regarded the kind of mercy adverted to as not true mercy. *See supra* note 4; *Drake*, 762 F.2d 1458. Here, no mention was made of mercy, except that society occasionally should be the object of mercy, as well as a criminal defendant. The prosecutor in this case may have tried to quote the Georgia Supreme Court, but he obviously was not successful. Finally, the prosecutor in *Drake* too pains to note that the quoted passages were taken from Georgia Supreme Court cases involving murder and the death penalty. The prosecutor in this case merely referred to the view of a "noted justice;" no mention was made of the context within which these views were expressed. From the foregoing, we consider the argument in *Drake* to be a much more severe statement concerning the appropriateness of mercy for a capital crime defendant, and therefore much more prejudicial than the inarticulate argument involved in this case.

reverse the district court's ruling that Bowen's sentencing hearing was rendered fundamentally unfair by improper prosecutorial argument.

## IV. COMPOSITION OF THE TRAVERSE JURY LIST

The district court concluded that Bowen was sentenced to die by a jury drawn from a list which unconstitutionally excluded women.[6] We agree.

Decisions by the Supreme Court and this court make it clear that a defendant may challenge the discriminatory selection of state court juries under the equal protection clause of the fourteenth amendment, *see Rose v. Mitchell,* 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979); *Castaneda v. Partida,* 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *United States v. Sneed,* 729 F.2d 1333 (11th Cir. 1984); *Gibson v. Zant,* 705 F.2d 1543 (11th Cir. 1983), and the sixth amendment, which vouchsafes the right to be tried by a jury chosen from a group reflecting a fair cross-section of the community. *See Duren v. Missouri,* 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *United States v. Tuttle,* 729 F.2d 1325 (11th Cir. 1984), *cert. denied,* — U.S. —, 105 S.Ct. 968, 83 L.Ed.2d 972 (1985); *Gibson,* 705 F.2d 1543. We have noted that the equal protection analysis employs a prima facie test virtually identical to the one used in the fair cross-section

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6. Given its disposition of the gender discrimination claim, the district court found it unnecessary to address Bowen's companion claim that blacks also were unconstitutionally underrepresented on the traverse jury list.

analysis. *See Tuttle,* 729 F.2d at 1327 n. 2; *Gibson,* 705 F.2d at 1546; *United States v. Perez-Hernandez,* 672 F.2d 1380, 1384 n. 5 (11th Cir.1982).[7]

The Supreme Court delineated the contours of the equal protection challenge in *Castaneda,* where it stated:

> The fist step is to establish that the group is one that is a recognizable, distinct class. . . . Next the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as . . . jurors, over a significant period of time. . . . Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

*Castaneda,* 430 U.S. at 494, 97 S.Ct. at 1280 (citations omitted); *Mitchell,* 443 U.S. at 565, 99 S.Ct. at 3005. More recently, the Supreme Court set forth the elements of a

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7. The sixth and fourteenth amendment analyses do differ in one significant respect. To prevail on an equal protection challenge, the defendant must show purposeful discrimination. *Duren,* 439 U.S. at 368 n. 26, 99 S.Ct. at 670 n. 26. Hence, if the defendant makes out a prima facie case, the burden of proof then shifts to the state to show the absence of discriminatory intent. *Id.; Castaneda,* 430 U.S. at 495, 97 S. Ct. at 1280; *Gibson,* 705 F.2d at 1546 n. 4. Since, however, discriminatory intent is irrelevant to a fair cross-section challenge, *Duren,* 439 U.S. at 368 n. 26, 99 S.Ct. at 670 n. 26, the state may rebut a sixth amendment prima facie case only by demonstrating "that a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process . . . that result in the disproportionate exclusion of a distinctive group." *Id.* at 367-68, 99 S.Ct. at 670-71 (footnote omitted); *see Willis v. Zant,* 720 F.2d 1212, 1217 (11th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 3546, 82 L.Ed.2d 849 (1984); *Gibson,* 705 F.2d at 1546 n. 4; *Perez-Hernandez,* 672 F.2d at 1384 n. 5.

fair cross-section prima facie case. To prevail on a sixth amendment jury composition challenge:

> [T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

*Duren*, 439 U.S. at 364, 99 S.Ct. at 668. After carefully reviewing the record, we hold that the district court correctly concluded that Bowen established a fourteenth amendment prima facie case.[8]

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8. In his habeas petition, Bowen contended that the jury panel which sentenced him to death was drawn from a traverse jury list "composed in violation of the Constitution of the United States." Record, Vol. 1 at 18. Since Bowen failed to specify the constitutional basis for his complaint, the district court stated that it would evaluate the jury composition claim under both the sixth and fourteenth amendments. *Id.* at 210. The court accordingly set forth in its opinion the *Castaneda* and *Duren* tests. *Id.* at 210-11. Absent from the court's opinion, however, is any discussion of the burden the state must carry to rebut a sixth amendment prima facie case or any findings on whether respondent had done so in this case. Because we are wary of reaching an issue not ruled upon by the district court, we base our decision regarding the jury composition issue solely on fourteenth amendment grounds. We note, however, that curiously wanting from the record is any evidence offered by respondent concerning a significant state interest justifying the underrepresentation of women on the Polk County traverse jury lists. *See supra* note 7. This is puzzling since the record established prior to the district court's ruling is replete with references to sixth amendment fair cross-section cases. *See, e.g., Bowen v. State*, 260 S.E.2d at 858 (citation to *Duren*); Respondent's Brief in Support of Answer and Return, Record, Vol. 1 at 26-29 (same); Magistrate's Report

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Respondent concedes that since women constitute a recognizable, distinct class, *see Duren*, 439 U.S. at 364, 99 S.Ct. at 668 (citing *Taylor*, 419 U.S. at 531, 95 S.Ct. at 698); *Sneed*, 729 F.2d at 1335, the first prong of the *Castaneda* test has been satisfied. The gravamen of his quarrel with the district court, however, focuses on the weight the court accorded the statistical disparity between the percentage of women residing in Polk County and the percentage of women on the traverse jury list.

Bowen was sentenced to die in 1978 by a jury drawn from the traverse jury list composed in the fall of 1977. The statistics admitted into evidence in the district court reflect a disparity of -22.7% between the percentage of women residing in the county and the percentage of women on the 1977 traverse jury list. The record further shows that this disparity was not an aberration; rather, the underrepresentation of women was even more dramatic in the four preceding traverse jury lists.[9]

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and Recommendation, *id.* at 136-41 (*Duren* prima facie case applied to facts of this case). In fact, Bowen, in response to a request by the magistrate, filed a pre-hearing brief in support of his contention that he need not show purposeful discrimination to establish a prima facie case. Brief of Petitioner, *id.* at 83.

9. The disparities are arrived at by comparing 1970 Census Bureau statistics for Polk County to the Polk County traverse jury lists, which are revised every two years. Respondent does not challenge this methodology. The district court based its ruling on the following breakdown by gender of the traverse jury pools and the county census figures:

(Continued on following page)

In the face of this evidence of a clear historical pattern of female underrepresentation on Polk County's traverse jury lists, respondent insists that the statistical disparities are not constitutionally significant. We do not agree.

We acknowledge that the Supreme Court has eschewed pronouncing precise mathematical standards for proving systematic exclusion of distinct classes, *see Alexander v.*

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1977 TRAVERSE JURY POOL

| Class | Number | % of pool | % of population | Disparity |
|---|---|---|---|---|
| Males | 1427 | 69.7% | 47.5% | [+]22.2% |
| Females | 612 | 29.8 | 52.5 | [—]22.7 |
| Sex Unknown | 8 | .5 | - | - |

1975 TRAVERSE JURY POOL

| Class | Number | % of pool | % of population | Disparity |
|---|---|---|---|---|
| Males | 1290 | 70.6% | 47.5% | [+]23.1% |
| Females | 533 | 28.2 | 52.5 | [—]24.3 |
| Sex Unknown | 4 | 2.2 | - | - |

1973 TRAVERSE JURY POOL

| Class | Number | % of pool | % of population | Disparity |
|---|---|---|---|---|
| Males | 1352 | 86.2% | 47.5% | [+]38.7% |
| Females | 217 | 13.8 | 52.5 | [—]38.7 |

1971 TRAVERSE JURY POOL

| Class | Number | % of pool | % of population | Disparity |
|---|---|---|---|---|
| Males | 1201 | 76.7% | 47.5% | [+]29.2% |
| Females | 365 | 23.3 | 52.5 | [—]29.2 |

1969 TRAVERSE JURY POOL

| Class | Number | % of pool | % of population | Disparity |
|---|---|---|---|---|
| Males | 1103 | 76.5% | 47.5% | [+]29.0% |
| Females | 338 | 23.5 | 52.5 | [—]29.0 |

Record, Vol. 1 at 212.

*Louisiana,* 405 U.S. 625, 630, 92 S.Ct. 1221, 1225, 31 L.Ed. 2d 536 (1972), and that we have followed its lead. *See, e.g., Gibson,* 705 F.2d at 1547; *Bryant v. Wainwright,* 686 F.2d 1373, 1376 (11th Cir.1982), *cert. denied,* 461 U.S. 932, 103 S.Ct. 2096, 77 L.Ed.2d 305 (1983). We do not, however, write on a clean slate. In factually similar cases, the Supreme Court, this court, and the former Fifth Circuit[10] all have found statistical variances near the 22.7% disparity present in this case to be constitutionally significant. *E.g., Turner v. Fouche,* 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed. 2d 567 (1970) (23%); *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (14%); *Gibson,* 705 F.2d 1543 (20% and 38%); *Machetti v. Linahan,* 679 F.2d 236 (11th Cir.1982) (36% and 42%), *cert. denied,* 459 U.S. 1127, 103 S.Ct. 763, 74 L.Ed.2d 978 (1983); *Porter v. Freeman,* 577 F.2d 329 (5th Cir.1978) (20.4%). We therefore have no difficulty concluding that the 22.7% variance between the percentage of women residing in Polk County and the percentage of women on the 1977 traverse jury list, immediately preceded by nearly a decade of even greater underrepresentation, is sufficient to satisfy the second prong of the *Castaneda* test.

The district court also found that the process employed by the Polk County jury commissioners in composing the traverse jury list was susceptible of abuse as a tool of discrimination. We agree.

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10. The Eleventh Circuit, in *Bonner v. City of Prichard,* 661 F. 2d 1206, 1209 (11th Cir.1981) (en banc), adopted as precedent decisions of the former Fifth Circuit handed down prior to October 1, 1981. We also are bound by decisions of Unit B of the former Fifth Circuit rendered after that date. *Stein v. Reynolds Secs., Inc.,* 667 F.2d 33, 34 (11th Cir.1982).

The Georgia law in effect when the 1977 traverse jury list was composed provided:

> At least biennially, or, if the senior judge of the superior court shall direct, at least annually, the board of jury commissioners shall compile and maintain and revise a jury list of intelligent and upright citizens of the county to serve as jurors. In composing such list the commissioners shall select a fairly representative cross section of the intelligent and upright citizens of the county from the official registered voters' list of the county as most recently revised by the county board of registrars or other county election officials. If at any time it appears to the jury commissioneds that the jury list, so composed, is not a fairly representative cross section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of any significantly identifiable group in the county which may not be fairly represented thereon.
>
> After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, except as otherwise provided herein and no new names shall be added until those names originally selected have been completely exhausted, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead.

Ga.Code Ann. §59-106 (current version at Ga.Code Ann. § 15-12-40 (1982)). Although the Supreme Court has

characterized this method of selection as "not inherently unfair," *Turner,* 396 U.S. at 355, 90 S.Ct. at 537, it also has recognized that the statute contained the potential for abuse. *Id.* at 356 & n. 14, 90 S.Ct. at 538 & n. 14. It is necessary therefore, to examine the testimony of the Polk County jury commissioners to determine whether the process they used to compose the traverse jury list was susceptible of abuse or not facially neutral.

Members of the jury commission testified both in the state trial court and in the district court. The following passage from the Georgia Supreme Court's summary of the state court jury composition hearing underscores the largely subjective approach taken by the jury commissioners:

> At the hearing on the jury challenge, several members of the Polk County Jury Commission were called to testify. Of the jury commissioners, four are white males, one is a white female, and one is a black male. The jury commissioners testified to the following effect: the appellant's jury was struck from a traverse jury panel which had been most recently revised in September-October, 1977. The panel was drawn from a 1975 Polk County voters registration list, a list of county voters who had voted in the last general election, a list of persons under court jurisdiction, telephone books, and city directories. The primary source from which the jurors were drawn was the list of voters who had voted in the last election. The commission was given brief instructions from the Polk County Superior Court Judge, including an instruction to have males, females, blacks and whites on the jury list. *The commission met as a group and discussed each name considered. They were considered on the basis of each jury commission member's acquaintance with them—specifically on the basis of character, abil-*

> *ity, and capability to be a juror. If everybody approved, the name would be placed on the jury list. The commission did not put anyone on the jury list about whom someone on the commission did not know something.* They did not take any investigative action to get to know people they did not know. (The jury commissioners were not aware of their duty, imposed by Code § 59-106 (1976 amendment), to supplement the jury list by going out into the county and personally acquainting themselves with other citizens of the county, if it appeared that the jury list, as composed, was not a fairly representative cross-section of the intelligent and upright citizens of the county.) Blacks were designated with "(c)" on the voters lists furnished to the panel, but all of them, particularly the black jury commissioner, knew pretty well the great majority of the black community. They did not know the percentages of male-female or black-white in Polk County, but no one was excluded from the traverse jury panel because of race, age or sex; and it was the aim of the jury commission to secure a cross-section of people from the community for the traverse jury panel.

*Bowen v. State,* 260 S.E.2d at 857-58 (emphasis added). At the federal habeas hearing, the jury commissioners who testified reiterated that no one was placed on the traverse jury list who was not personally known by one of the commissioners. The district court concluded that this method of selection was susceptible of abuse. Record, Vol. 1 at 215.

Respondent argues that in addressing the third prong of the *Castaneda* test, the district court improperly focused on only the subjective attributes of the selection process. Respondent urges that the court should have incorporated into its analysis (1) the fact that a woman and a black man were members of the 1977 jury commission; (2) the fact

that the jury commissioners did not rely exclusively on the voters registration list to compose the traverse jury list; and (3) the commissioner's assertions that no one was excluded from the list solely on the basis of race or gender. Respondent also argues that the commissioners' collective familiarity with nearly everyone in the county could have prevented abuse of the method of selection. These arguments, however, miss the mark and evince a fundamental misunderstanding of both the third prong of the *Castaneda* test and the distinction between a prima facie case and a rebuttal case.

To fulfill the third requirement of *Castaneda,* Bowen was obliged to show that the traverse jury selection process used in 1977 contained the potential for abuse. Bowen clearly made such a showing: (1) the jury commissioners knew the gender of every potential juror; (2) the commissioners were, as a group, personally familiar with practically everyone in the county; and (3) the commissioners discussed amongst themselves the qualifications of each person considered. That a member of the jury commission was black or female, or that several sources were used to gather names, neither magically removes from this process its highly subjective component nor diminishes the ease with which the process could have been manipulated. The same is true of the jury commissioners' assertions that they did not discriminate. This testimony, properly viewed, is at best an attempt to overcome the prima facie case of discrimination. Since the district court correctly concluded that Bowen established a *Castaneda* prima facie case, the only remaining question is whether or not the court erred in holding that respondent failed to rebut it.

To successfully rebut the prima facie showing of unconstitutional action, the state must present sufficient evidence to "dispel the inference of intentional discrimination." *Castaneda,* 430 U.S. at 497-98, 97 S.Ct. at 1281-82. Although there is no litmus test by which to judge a rebuttal case, it is clear that evidence in rebuttal must focus on "showing that permissible [gender] neutral selection criteria and procedures" have produced the underrepresentation of women on the traverse jury list. *Alexander,* 405 U.S. at 632, 92 S.Ct. at 1226; *Guice v. Fortenberry,* 722 F.2d 276, 280 (5th Cir.1984); *Perez-Hernandez,* 672 F.2d at 1387. While the testimony of alleged discriminators should not be summarily dismissed, *see Castaneda,* 430 U.S. at 498, 97 S.Ct. at 1282, it should be examined with a healthy amount of judicial scrutiny. *Perez-Hernandez,* 672 F.2d at 1387. Specifically, "affirmations of good faith in making . . . selections are insufficient to dispel a prima facie case of systematic exclusion." *Alexander,* 405 U.S. at 632, 92 S.Ct. at 1226; *Castaneda,* 430 U.S. at 498 n. 19, 97 S.Ct. at 1282 n. 19; *Guice,* 722 F.2d at 280; *Gibson,* 705 F.2d at 1549. The district court applied these principles to the evidence before it, and properly found that respondent failed to carry his burden.

Respondent argues here, as he did unsuccessfully in the district court, that this case is distinguishable in crucial respects from *Alexander, Castaneda,* and their progeny. In support of his position, respondent again directs our attention to the fact that the jury commissioners were neither all white nor all male, to the commissioners' use of multiple sources to gather names of potential jurors, and to the commissioners' denials of discrimination and their asserted awareness of the duty to include on the traverse

jury list a fair cross-section of the community. Respondent submits that if the aggregation of these facts does not constitute a successful rebuttal case, none really exists. We are compelled to disagree.

Initially, the fact that a black man and white woman were members of the 1977 jury commission may be irrelevant. The Supreme Court has made it clear that in examining a state's rebuttal case, a court may not presume that persons of a particular class would not discriminate against others of the same class. *Castaneda,* 430 U.S. at 500, 97 S.Ct. at 1283. Moreover, regardless of the number and nature of the sources utilized by the jury commissioners to compile names of potential jurors, the fundamental fact remains that "the opportunity to discriminate was presented at later stages in the [jury selection] process." *Alexander,* 405 U.S. at 632, 92 S.Ct. at 1226. When respondent's rebuttal case is thus reduced, we are left with the jury commissioners' denials of discrimination. True, the testimony of alleged discriminators is not *per se* insufficient to rebut an equal protection prima facie case. *See Perez-Hernandez,* 672 F.2d at 1387. It is, however, subject to being weighed by the trial court in considering all the evidence presented. There is a notable absence in this record of any adequate explanation for the clear pattern of female underrepresentation on the traverse jury lists in Polk County. The record provides ample support for the finding of the district court that respondent failed to overcome Bowen's prima facie case of purposeful discrimination. In the words of the Supreme Court, "the opportunity for discrimination was present and [it cannot be said] on this record that it was not resorted to by the commissioners." *Alexander,* 405 U.S. at 632, 92 S.Ct. at 1226

*(quoting Whitus v. Georgia,* 385 U.S. 545, 552, 87 S.Ct. 643, 647, 17 L.Ed.2d 599 (1967)).

## V. CONCLUSION

For the reasons stated in Section II(b), the judgment of the district court in granting habeas corpus relief on the *Sandstrom* claim is REVERSED.

For the reasons stated in Section III, the judgment of the district court in granting habeas corpus relief on the prosecutorial argument claim is REVERSED.

For the reasons stated in Section IV, the judgment of the district court in granting Bowen a new sentencing trial is AFFIRMED and the case REMANDED for the granting of appropriate relief. Bowen is entitled to a new sentencing proceeding before a properly empaneled jury.

JOHNSON, Circuit Judge, specially concurring in part and dissenting in part:

I concur in Section IV of the majority opinion, affirming the judgment of the district court in granting petitioner a new sentencing trial because he was sentenced by an unconstitutionally selected jury. I also concur in Section II(a) of the majority opinion, which holds that a *Sandstrom* violation occurred. However, I dissent from Section II(b) of the opinion, which holds the *Sandstrom* violation to be harmless error, and Section III, which holds that the petitioner was not prejudiced by improper prosecutorial argument at the sentencing trial.

## I. THE SANDSTROM ISSUE

I acknowledged that I am bound by the recent decisions of the *en banc* court in *Davis v. Kemp,* 752 F.2d 1515

(11th Cir. 1985) (en banc), and *Tucker v. Kemp*, 762 F.2d 1496 (11th Cir.1985) (en banc). However, the majority's opinion unjustifiably extends the harmless error concepts to a case where the intent of the admitted killer was clearly at issue.

In *Davis*, the Court identified two circumstances under which the harmless error rule might be applicable to *Sandstrom* violations: (1) where the evidence of the defendant's guilt was overwhelming, and (2) where the invalid instruction concerned an element of the crime which was not at issue at trial. *Id.* at 1521; *Lamb v. Jernigan*, 683 F.2d 1332 (11th Cir.1982); *cert. denied* 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983). In *Davis*, the faulty instruction concerned the intent of the defendant, but the Court held that the defendant did not contest the issue of intent. *See Davis, supra*, 752 F.2d at 1521. The Court held that under those circumstances the faulty instruction, which impermissibly shifted the burden of proof on the intent issue to the defendant, was harmless error. In reaching its conclusion, the Court relied heavily on *Engle v. Koehler*, 707 F.2d 241 (6th Cir.1983), *aff'd by an equally divided court*, — U.S. —, 104 S.Ct. 1673, 80 L.Ed.2d 1 (1984) (per curiam), in which the Sixth Circuit held that a *Sandstrom* violation could be harmless error where the defendant admits that an intentional, malicious killing occurred but claims non-participation in the crime; but that such a violation could not be harmless error where the defendant asserts lack of *mens rea*. *See Davis, supra*, 752 F.2d at 1521; *Engle, supra*, 707 F.2d at 246.

Although intent was not contested in *Davis*, intent was very much at issue in the instant case. The petitioner

raised a temporary insanity defense, which called into question his capacity to form the requisite intent for malice murder. This is the same defense that was raised in *Engle,* in which the Sixth Circuit held that a *Sandstrom* violation was not harmless error. 707 F.2d at 246. Nevertheless, the majority holds that the *Sandstrom* violation, which may have given some jurors the impression that the petitioner had the burden of proving that he lacked the requisite intent for malice murder, was harmless error.

The majority points out that the faulty jury instruction in this case stated that one is presumed to intend the natural and probable consequences of his acts *if he is a person of "sound mind".* The majority argues that this presumption could have become operative only if the jury first determined that the petitioner was sane, *i.e.,* if the jury had already rejected the petitioner's insanity defense. The majority concludes that if the presumption had become operative, and the *Sandstrom* violation thus occurred, the violation was rendered harmless by the fact that petitioner's defense on the issue of intent had already been rejected by the jury.

The majority's analysis fails to address the fact that the State was required to prove not that petitioner had a sound mind but, rather, that he had the requisite intent for malice murder. Even if the jury rejected petitioner's argument of temporary insanity, the issue of intent was not a defense that petitioner had to prove; intent was an element of the crime that the State had the burden of proving beyond a reasonable doubt. *Davis, supra,* 752 F.2d at 1528 (Johnson, J., dissenting). By arguing that he had a diminished capacity to form the requisite intent for malice

murder, defendant did not thereby admit that he had the requisite intent if he had the capacity to form it. Since intent was a contested issue, holding a *Sandstrom* error harmless in the present case is an unwarranted extension of the "harmless error" rule.

## II. THE PROSECUTORIAL MISCONDUCT ISSUE

In the present case, the prosecutor argued that a "noted justice" had stated that mercy would be an inappropriate consideration for the defendant. The prosecutor implored the jury to "fulfill the commands of the law," and thus inflict the death penalty on the defendant. The majority holds that, despite this concededly improper argument, the prosecutor did not render the sentencing phase of the trial fundamentally unfair, and appellant is not entitled to habeas relief on this ground. The majority relies on the "prejudice" test adopted by this Circuit in the *en banc* decision *Brooks v. Kemp,* 762 F.2d 1383, 1413 (11th Cir.1985) (en banc), which held that a court should grant habeas relief for improper prosecutorial argument at the sentencing phase only if there is a reasonable probability that, in the absence of such argument, the death penalty would not have been imposed.

In holding that the improper prosecutorial argument was not grounds for relief, the majority disregards the recent Supreme Court decision in *Caldwell v. Mississippi,* — U.S. —, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), in which the Court vacated a death sentence because the prosecutor used the same kind of improper argument that was used in the present case. Because the recent Supreme Court decision rejects the "prejudice" test adopted in *Brooks,* I dissent from Section III of the majority opinion.

A. *Caldwell* Rejects the *Brooks* Prejudice Test

In vacating the defendant's death sentence because of improper prosecutorial argument, the *Caldwell* Court applied a prejudice standard that differs significantly from the 11th Circuit standard formulated in *Brooks* and relied upon by the majority. In *Brooks,* the *en banc* court held that to determine whether to grant habeas relief for improper prosecutorial arguments the reviewing court must decide whether there is a reasonable probability that, had the remarks not been made, the sentencing outcome would have been different. *Brooks, supra,* at 1402. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Drake v. Kemp,* 762 F.2d 1449, 1458 (11th Cir.1985) (en banc); *Strickland v. Washington,* 466 U.S. 668, —, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984).

The basis for the standard adopted in *Brooks* was the notion that habeas relief should be available only when an error has affected the "fundamental fairness" of the challenged proceeding. This "fundamental fairness" standard originated in *Donnelly v. DeChristoforo.* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). In that case, the Supreme Court set forth the standard for reviewing habeas corpus petitions raising the impropriety of a state prosecutor's argument in the *guilt* phase of a *non-capital* offense. In holding that the relevant inquiry was whether the remark violated due process, the majority stated that "not every trial error or infirmity . . . constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.' " *Brooks, supra,* at 1400, citing *Donnelly,* 416 U.S. at 642, 94 S.Ct. at 1871.

In order to elaborate on the fundamental fairness standard, the *Brooks* Court adopted the prejudice standard used by the Supreme Court in *Strickland v. Washington, supra.* The *Brooks* Court held that the Court in *Strickland,* "while addressing a specific Sixth Amendment violation, recognized that 'fundamental fairness' is the central concern of the writ of habeas corpus." *Brooks, supra,* at 1401, citing *Strickland,* 466 U.S. at —, 104 S.Ct. at 2070, 80 L.Ed.2d at 700. The *Brooks* Court continued, "Thus, the [*Strickland*] Court acknowledged that fundamental fairness, the same standard adopted in *Donnelly, Donnelly,* is the governing principle in reviewing errors of counsel. The [*Strickland Court's*] use of the 'reasonable probability' test to elaborate the underlying principle suggests its applicability to other areas in which fundamental fairness is the guide." *Brooks, supra,* at 1401. In short, *Brooks* held that the standard used to test fundamental fairness in the context of ineffective assistance of counsel claims is equally applicable in the context of prosecutorial misconduct claims in capital cases.

In support of its adoption of the "reasonable probability" test, the *Brooks* Court argued that that test was "consistent with the standards discussed in *Donnelly* and with subsequent cases applying the fundamental fairness standard." *Id.* The Court claimed that those cases indicated that, in determining whether improper argument had a prejudicial impact on the sentencing proceeding, it was necessary to look beyond the types of argument used and to look at the strength of the evidence as well. The Court concluded, "Even argument greatly exceeding the bounds of propriety will not be fundamentally unfair in the guilt phase of a case with overwhelming evidence be-

cause of the low probability of the argument's impact." *Id.* at 1401-02 (footnote omitted).

The majority in the present case relies on the standard adopted in *Brooks* in determining that the improper prosecutorial argument was not a ground for vacating the death sentence. The majority holds that there was no reasonable probability that, absent the improper statements of the prosecutor, Bowen would not have been sentenced to death. *Supra* at 682.

In concluding that the prosecutor's remarks required reversal of the death sentence, the *Caldwell* Court did not refer to a "reasonable probability" standard. The Court consistently emphasized that the Eighth Amendment requires a heightened standard of reliability in the capital sentencing decision. *See Caldwell, supra,* — U.S. at —, —, 105 S.Ct. at 2639, 2646. The Court concluded, "Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at —, 105 S.Ct. at 2646.

The "reasonable probability" test adopted by the *en banc* court in *Brooks* is incompatible with *Caldwell* for three reasons. First, the "reasonable probability" test is inconsistent with the *Caldwell* Court's language in the final section of the majority opinion. The Court held that, for the sentencing phase to satisfy the Eighth Amendment's heightened standard of reliability, the reviewing court must be able to say that the improper argument "had no effect on the sentencing decision." *Id.* This is a far more difficult standard for the State to satisfy than the *Brooks* standard. Unlike the *Brooks* standard, which

places the burden on the defendant to show prejudice, the *Caldwell* standard places the burden of proving the absence of prejudice on the State. Prejudice will be presumed unless the reviewing court can say that the improper argument had no effect on the jury's decision. *See id.* In addition, the State cannot overcome this presumption merely by showing that there is a "reasonable probability" that the improper argument did not affect the outcome. The State must prove that the improper argument "had no effect."

The second reason the *Brooks* standard is incompatible with *Caldwell* is that *Brooks* treated the "reasonable probability" test as a monolithic standard to be applied in every habeas corpus proceeding, regardless of whether the error complained of occurred under the Fifth, Sixth, or Eighth Amendment. *See Brooks, supra,* at 1399-1401. In specifically alluding to the *heightened* need for reliability in the capital sentencing phase required by the Eighth Amendment, the *Caldwell* Court suggested that different prejudice tests are required for the various types of constitutional challenges to the fundamental fairness of a state trial. *Caldwell, supra,* — U.S. at —, 105 S.Ct. at 2645.

The third reason the *Brooks* standard should no longer be followed is that, although that standard requires a reviewing court to take into account the strength of the evidence against the defendant, *Brooks, supra,* at 1401-02, the *Caldwell* Court looked solely at the type of argument used, in the context of the entire argument and instructions, in determining whether the sentencing phase might have been rendered unfair. The *Caldwell* Court did not

take the strength of the evidence into account at all in determining whether the improper argument affected the fairness of the sentencing phase. *See Caldwell, supra,* — U.S. at — — —, 105 S.Ct. at 2644-45. On the contrary, the Court suggested that a reviewing court could not accurately determine whether a jury might have returned a different sentence in the absence of improper argument. The Court said, "It is beyond question that an appellate court, performing its task with a presumption of correctness, would be relatively incapable of evaluating the 'literally countless factors that [a capital sentencer] consider[s]' . . . in making what is largely a moral judgment of the defendant's desert." *Id.* at — n. 7, 105 S.Ct. at 2645 n. 7 (citation omitted). In short, the *Caldwell* Court applied a prejudice standard more closely resembling the harmless error test of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), than the prejudice test of *Strickland.*

In addition to indicating that the *Brooks* prejudice standard was wrongly adopted, *Caldwell* indicates specific flaws in the way the *Brooks* standard has been applied. The dissent in *Caldwell* argued that the impact of the prosecutor's argument regaring appellate review was mitigated by later prosecutorial comments that the jury played an important role in the sentencing process. *Caldwell, supra,* — U.S. at —, 105 S.Ct. at 2650 (Rehnquist, J., dissenting). However, the majority explicitly rejected this argument of the dissent, on the grounds that, "even if the prosecutor's later comments did leave the jury with [the] view that they had an important role to play, the prosecutor did not retract, or even undermine, his previous [improper comment]." *Caldwell, supra,* at — n. 7, 105 S.Ct.

at 2645 n. 7. The Court also emphasized the fact that the trial judge failed to issue strong curative instructions directed specifically at the improper argument. *Id.* at —, 105 S.Ct. at 2645.

The majority in the present case places heavy emphasis on the fact that "[a]ny prejudice from the improper remarks was for the most part alleviated by other statements of the prosecutor and the judge's charge." *Supra* at 682. The majority ignores the significance of the fact that neither the trial judge nor the prosecutor made any attempt to cure or retract the specific remarks that the majority concedes were improper. Yet, *Caldwell* clearly holds that general remarks to the effect that the jury bears responsibility for the sentencing decision are not sufficient to cure the prejudice caused by improper prosecutorial arguments aimed at diminishing the jury's sense of responsibility. *Caldwell, supra,* at — n. 7, 105 S.Ct. at 2645 n. 7.

B. *Caldwell* Controls the Outcome in the Present Case

In *Caldwell,* the prosecutor argued that the jury would not bear responsibility for the imposition of a death sentence, because a death sentence would automatically be reviewed by an appellate court. The Court said that a capital sentencing jury, made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice, might welcome the opportunity to diminish the importance of its role and delegate its decision making authority to others. The Court said,

> This problem is especially serious when the jury is told that the alternative decision makers are the justices of the state supreme court. It is certainly plausible to believe that many jurors will be tempted to view

these respected legal authorities as having more of a "right" to make such an important decision than has the jury. *Id.* — at —, 105 S.Ct. at 2642.

The essence of the impropriety in *Caldwell* was the implication in the prosecutor's argument that the jury did not have the primary responsibility for deciding whether the death sentence was appropriate but, rather, that the jury had a *duty* to impose the death sentence in order to give effect to the decision of other authorities who were better able to judge the appropriateness of that penalty. Such authorities might include not only the justices of a state supreme court but also the prosecutor, grand jury, or police.

In the present case the prosecutor argued not only that a noted state supreme court justice had already determined that the death penalty was appropriate for the defendant, but also that the law itself commanded such a sentence. This argument went beyond what the Court condemned in *Caldwell.* Since the danger that the jury might choose to minimize the importance of its role was at least as high in the present case as it was in *Caldwell,* the analysis the Supreme Court used in deciding to vacate the death sentence in *Caldwell* should control the outcome in the present case. Because we cannot say that the improper arguments in the present case had no effect on the jury's sentencing decision, I dissent.

GEORGE C. YOUNG, District Judge, concurring in part and dissenting in part:

While concurring in the Court's analysis and conclusion on each of the *Sandstrom* and the closing argument issues, I disagree that the petitioner is entitled to relief

based on an alleged Fourteenth Amendment violation because of underrepresentation of women in the sentencing jury pool.

As the Court points out, challenges by criminal defendants in state court proceedings to the discriminatory selection of juries have been recognized under the Equal Protection Clause of the Fourteenth Amendment and the "fair cross-section" requirement implicit in the Sixth Amendment right to an impartial jury. The district court below held that Bowen, a male convicted of raping and murdering a twelve year old female, was denied equal protection of the laws in his sentencing because females were underrepresented on the 1977 traverse jury list from which his sentencing jury was selected. The district court thus found it unnecessary to evaluate Bowen's claim under the Sixth Amendment. In affirming the district court, the majority likewise purports to reach only the Fourteenth Amendment question.

In my opinion, both logic and Supreme Court precedent compel the conclusion that Bowen lacks standing to assert, on *equal protection* grounds, that women were underrepresented in the jury pool. In this regard, I would adopt the reasoning of Judge Gee, writing for the new Fifth Circuit, in *United States v. Cronn,* 717 F.2d 164 (5th Cir.1983). Petitioner's *own* equal protection rights obviously were not violated in this case by the alleged underrepresentation of women, and there is no justification for permitting *jus tertii* standing. *Id.* at 169-170.

I recognize that this Circuit has reached a contrary result in a line of cases beginning with *United States v. Perez-Hernandez,* 672 F.2d 1380, 1385-86 (11th Cir.1982), which,

like *Cronn*, involve equal protection challenges to the selection of the grand jury foremen. *See also United States v. Holman*, 680 F.2d 1340, 1355-56 (11th Cir.1982); *United States v. Cross*, 780 F.2d 631, 633-34 (11th Cir.1983); *United States v. Sneed*, 729 F.2d 1333, 1334 (11th Cir.1984). The Fifth Circuit in *Cronn* persuasively points out that the "apparent conflict" among recent Supreme Court decisions, which this Court perceived in *Perez-Hernandez*, stems from a misreading of Justice Marshall's plurality opinion in *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972). The *Peters* opinion did not discuss standing "in an equal protection context," as *Perez-Hernandez* states (672 F.2d at 1385); indeed, the *Peters* Court did not reach the equal protection issue. 407 U.S. at 497 n. 5, 92 S.Ct. at 2165 n. 5. The discussion of standing in *Peters* pertains, rather, to grand jury composition challenges under the due process clause which—like Sixth Amendment, fair cross-section challenges to petit jury composition—may be raised by any criminal defendant, regardless of his circumstances. *Id.* at 504, 92 S.Ct. at 2169. *See Cronn*, 717 F.2d at 167-68, and nn. 4 and 6. Chief Justice Burger's dissent in *Peters* noted: "While the opinion of Mr. Justice Marshall refrains from relying on the Equal Protection Clause, it concludes that if petitioner's allegations are true, he has been denied due process of law." 407 U.S. at 509, 92 S.Ct. at 2172. In *United States v. Cross*, 708 F.2d at 633 n. 4, this Court acknowledged that the *Peters* plurality opinion "analyzed the exclusion of blacks from grand jury service *as a violation of due process.*" (Emphasis added).

On the other hand, in the equal protection cases of *Castaneda v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272,

1280, 51 L.Ed.2d 498 (1977), and *Rose v. Mitchell*, 443 U.S. 545, 565, 99 S.Ct. 2993, 3005, 61 L.Ed.2d 739 (1979), the Supreme Court unequivocally stated that

> "in order to show an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of *his* race or the identifiable group *to which he belongs.*"

(Emphasis Added).

But whether *Perez* and its progeny were decided correctly or not, this panel is bound by it in the absence of a reversal by the Eleventh Circuit en banc or by an intervening contrary decision by the Supreme Court. *United States v. Holman*, 680 F.2d at 1356 n. 11. I construe *Hobby v. United States*, 468 U.S. —, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984), as a contrary intervening decision which mandates a re-assessment of the *Perez* holding.

In *Hobby*, the Supreme Court evaluated the challenge of a white male to the underrepresentation of blacks and women in the position of grand jury foreman as a due process challenge. In holding that such discrimination would not warrant reversal of petitioner's conviction and dismissal of the indictment against him, the Supreme Court sought to distinguish its previous ruling in *Rose v. Mitchell, supra*, as follows:

> "Petitioners' reliance upon *Rose* is misplaced. *Rose* involved a claim brought by two Negro defendants under the Equal Protection Clause. As members of the class allegedly excluded from service as grand jury foremen, the *Rose* defendants had suffered the injuries of stigmatization and prejudice associated with racial discrimination. The Equal Protection Clause has long

been held to provide a mechanism for the vindication of such claims in the context of challenges to grand and petit juries. *See, e.g., Castaneda v. Partida,* 430 U.S. 482 [97 S.Ct. 1272, 51 L.Ed.2d 498] (1978); *Hernandez v. Texas,* 347 U.S. 475 [74 S.Ct. 667, 98 L.Ed. 866] (1954); *Strauder v. West Virginia,* 100 U.S. 303 [10 Otto 303, 25 L.Ed. 664] (1880). Petitioner, however, has alleged only that the exclusion of women and Negroes from the position of grand jury foreman violates his right to fundamental fairness under the Due Process Clause. As we have noted, discrimination in the selection of federal grand jury foreman cannot be said to have a significant impact upon the due process interests of criminal defendants. Thus, the nature of petitioner's alleged injury and the constitutional basis of his claim distinguish his circumstances from those of the defendants in *Rose.*

• • •

Given the nature of the constitutional injury in *Rose,* the peculiar manner in which the Tennessee grand jury selection operated, and authority granted to the one who served as foreman, the Court assumed in *Rose* that discrimination with regard to the foreman's selection would require the setting aside of a subsequent conviction, 'just as if the discrimination proved has tainted the selection of the entire grand jury venire,' *Rose v. Mitchell, supra* [443 U.S.] at 551-52, n. 4 [99 S.Ct. at 2997-98, n. 4]. No such assumption is appropriate here, however, in the very different context of the due process challenge by a white male to the selection of foremen of federal grand juries."

— U.S. at — - —, 104 S.Ct. at 3098-99, 82 L.Ed.2d at 267-69. *Hobby,* then, makes clear and firm the Supreme Court's previously stated requirement that a petitioner seeking to raise an equal protection challenge must be a member of the race or group allegedly underrepresented on juries or

grand juries. By implication, one who is not a member of the underrepresented group lacks standing to raise such a challenge.

In addition, *Hobby* demonstrates that there is a difference in the evaluation of a due process violation claim from that of an equal protection violation claim. Discrimination in selection of a grand jury foreman could be an equal protection violation (*Rose v. Mitchell*, supra) but would not be a due process violation (*Hobby v. United States, supra*). Likewise, there may, in some cases of jury composition disparities, be a difference in the results depending upon whether the challenges are examined under the Fourteenth Amendment equal protection standard or the Sixth Amendment fair cross-section standard. Judge Fay has, for this Court, rested his decision solely on the Fourteenth Amendment claim and declined to decide the Sixth Amendment challenge in the absence of findings or a ruling by the district judge on that issue.

For the reasons set forth above, I dissent to Part IV of the majority opinion; I would reverse the district court's grant of a new sentencing trial and would remand for a consideration of the issues unresolved in the district court including, but not limited to, the Sixth Amendment fair cross-section claim.

## APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-8327

CHARLIE BENSON BOWEN,

Petitioner-Appellee,

versus

RALPH KEMP, Warden, Georgia
Diagnostic and Classification Center,

Respondent-Appellant.

(Filed December 2, 1986)

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 6, 1985, 11 Cir., 1985, — F.2d —).

(December 2, 1985)

Before FAY and JOHNSON, Circuit Judges, and YOUNG*, District Judge.

PER CURIAM:

The court having been polled at the request of one of the members of the court, and a majority of the circuit judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for rehearing en banc is DENIED.

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* Honorable George C. Young, U.S. District Judge for the Middle District of Florida, sitting by designation.

KRAVITCH, Circuit Judge, dissenting, with whom JOHNSON and CLARK, Circuit Judges, join:

As Judge Johnson points out in his dissent, the standard for evaluating claims of prosecutorial misconduct which this court adopted in *Brooks v. Kemp*, 762 F.2d 1383, 1413 (11th Cir. 1985) (*en banc*), and which the majority applied in the instant case, is incompatible with the standard enunciated by the Supreme Court in *Caldwell v. Mississippi*, — U.S. —, 105 S.Ct. 2633 (1985). To date, this court has not resolved this potential conflict. Although the majority of the *Bowen* panel, in its denial of panel rehearing, makes the cursory assertion that there is no conflict between the two standards, it furnishes no analytical basis for such a conclusion. The court has not yet squarely addressed the issue and reconciled the language of *Brooks* and *Caldwell*. I therefore dissent from the denial of Bowen's petition for rehearing en banc.

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8327

D.C. Docket No. 82-166

CHARLIE BENSON BOWEN,

Petitioner-Appellee,

versus

RALPH KEMP, WARDEN,
GEORGIA DIAGNISTIC AND
CLASSIFICATION CENTER,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before FAY and JOHNSON, Circuit Judges, and YOUNG*, District Judge.

### JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is

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*Honorable George C. Young, U.S. District Judge for the Middle District of Florida, sitting by designation.

JOHNSON, Circuit Judge, concurred in part and dissented in part and filed an opinion.

YOUNG, District Judge, sitting by designation, concurred in part and dissented in part and filed an opinion.

hereby, AFFIRMED in part and REVERSED in part; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

Entered: August 6, 1985

For the Court: Spencer D. Mercer, Clerk

/s/ By: Warren A. Godfrey

ISSUED AS MANDATE: July 11, 1986

## APPENDIX E

BOWEN v. KEMP

Charlie Benson BOWEN,

Petitioner-Appellee,

v.

Ralph KEMP, Warden Georgia Diagnostic and Classification Center,

Respondent-Appellant.

No. 84-8327.

United States Court of Appeals,
Eleventh Circuit.

Jan. 28, 1987.

On Appeal from the United States District Court for the Northern District of Georgia; Harold L. Murphy, Judge.

Prior report: 11th Cir., 778 F.2d 623.

Before RONEY, Chief Judge, GODBOLD, TJOLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

*ON SUA SPONTE RECONSIDERATION*

BY THE COURT:

On the Court's own motion, a majority of the judges in active service having voted in favor of rehearing this appeal en banc,

IT IS ORDERED that the mandate issued on July 11, 1986, is RECALLED and that this case shall be heard by this court sitting en banc, *with* oral argument on a date hereafter to be fixed. The clerk will specify a briefing schedule for the filing of en banc briefs.

The previous panel's opinion and the order entered on December 2, 1985, denying rehearing and rehearing en banc are VACATED.

**APPENDIX F**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-8327

CHARLIE BENSON BOWEN,

Petitioner/Appellee,

v.

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent/Appellant.

MOTION ON BEHALF OF APPELLANT
TO REISSUE THE MANDATE

Please serve:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-8327

CHARLIE BENSON BOWEN,

Petitioner/Appellee,

v.

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent/Appellant.

MOTION ON BEHALF OF APPELLANT
TO REISSUE THE MANDATE

Comes now Ralph Kemp, Respondent-Appellant in the above-styled action, by and through counsel, Michael J. Bowers, Attorney General for the State of Georgia and files this his motion to reissue the mandate which was recalled *sua sponte* by order of this Court dated January 28, 1987, by showing and stating the following:

On March 16, 1984, the United States District Court for the Northern District of Georgia, Rome Division granted federal habeas corpus relief to Petitioner-Appellee, Charlie B. Bowen, holding that Petitioner was entitled to a new trial as to guilt/innocence due to an allegedly impermissibly burden-shifting charge on the element of intent. The district court also found that Charlie Bowen was entitled to a new trial as to punishment because the traverse jury which resentenced Petitioner was allegedly drawn from an unconstitutionally composed jury pool and because the prosecutor's argument during the sentencing phase was found by this Court to have gone beyond the

"bounds of constitutional tolerance". Respondent-Appellant filed a notice of appeal in this Court.

On August 6, 1985, this Court affirmed the district court's decision that the traverse jury was unconstitutionally composed, but reversed the district court's ruling on the *Sandstrom* and prosecutorial argument issues. *Bowen v. Kemp,* 769 F.2d 672 (11th Cir. 1985).

Petitioner-Appellee's petition for rehearing was denied on November 5, 1985. Respondent-Appellant filed no petition for rehearing. *Bowen v. Kemp,* 776 F.2d 1486 (11th Cir. 1985). Petitioner-Appellee filed a petition for writ of certiorari in the Supreme Court of the United States on February 5, 1986. This petition for writ of certiorari was denied on July 9, 1986. Subsequently, the mandate of this Court was issued on July 11, 1986 and on July 16, 1986, the mandate of this Court was made the judgment of the United States District Court for the Northern District of Georgia, Rome Division. At this point, this Court's appellate jurisdiction over this case ended. The judgment of the court was final when the mandate was made the order of the district court.

On December 16, 1986, pursuant to the motion of counsel for Petitioner-Appellee, the Northern District ordered that the parties brief the remaining issues which were not decided in the initial order of the district court, prior to Petitioner being resentenced as ordered by this Court's decision in *Bowen v. Kemp,* 769 F.2d 672, 689 (11th Cir. 1985), in which this Court ordered that Petitioner be provided a "new sentencing proceeding before a properly impaneled jury."

On January 28, 1987, this Court entered an order "on sua sponte reconsideration" recalling the mandate issued on July 11, 1986, vacating the previous panel's opinion and order entered on December 2, 1985, denying rehearing and rehearing *en banc* and setting forth a briefing schedule for the filing of *en banc* briefs.

Respondent-Appellant respectfully submits that Appellant filed no motion for rehearing, filed no motion for rehearing *en banc,* nor did counsel for Respondent-Appellant file a petition for writ of certiorari in the Supreme Court of the United States seeking review of this Court's opinion granting federal habeas corpus relief and granting Petitioner-Appellee a new trial as to sentence. Rather, Respondent-Appellant has at all times since the entering of this Court's decision in *Bowen v. Kemp, supra,* stood ready to retry Petitioner-Appellee as to sentence. However, due to the filing by counsel for Petitioner of a petition for rehearing and a petition for a writ of certiorari, as well as seeking to litigate in the district court any unresolved issues in the case, Respondent-Appellant has not been able to retry Petitioner as ordered by this Court.

Respondent-Appellant submits that upon the denial of the petition for writ of certiorari filed on behalf of Petitioner-Appellee and the issuance of this Court's mandate on July 11, 1986, which was made the mandate of the district court on July 16, 1986, the judgment of this Court as to those issues before this Court on appeal became final. Respondent-Appellant respectfully submits that after such time as the mandate was issued and made the judgment of the district court, this Court lacked jurisdiction to "sua sponte" reconsider its decision of December 2, 1985 deny-

ing rehearing and rehearing *en banc*. There exists no case or controversy at this time which either party has sought to adjudicate in the Eleventh Circuit which would confer jurisdiction upon this Court and there exists no basis for *sua sponte* reconsideration of the final judgment of this Court.

There exists no statutory authority which empowers this Court to confer jurisdiction upon itself in a case in which there has been a final judgment. The actions of this Court in this case totally emasculate the concept of finality of judgments. Therefore, the mandate should be issued instanter.

This case has been final since the mandate of this Court was made the judgment of the lower court on July 16, 1986 and neither of the parties to this action have sought readjudication of those issues already decided by this Court on appeal. In point of fact, Respondent-Appellant had stood ready to retry the Petitioner-Appellee as ordered by this Court in *Bowen v. Kemp, supra*. The *sua sponte* reconsideration ordered by this Court lacks of jurisdictional basis and violates the principle of finality of judgments.

While on occasion the state has asked that a mandate be recalled, the mandate is generally asked to be recalled within the 90 day period for filing of a petition for a writ of certiorari from an adverse judgment of this Court in a federal habeas corpus action. Respondent-Appellant submits that until the expiration of this 90 day period for the filing of a timely petition for a writ of certiorari, the decision of this Court does not yet become final. A party's request to recall the mandate prior to the expiration of

this 90 day period presents an appropriate circumstance in which this Court may recall or stay the mandate in accordance with the Federal Rules of Appellate Procedure. However, to recall a mandate six months after the judgment has been finalized, due to the receipt by the district court of the mandate of this Court, clearly is an abuse of this Court's discretion which ignores this Court's lack of a jurisdictional basis upon which to act.

## RELIEF REQUESTED

Respondent-Appellant asks that this Court stay the briefing period set forth by letter to counsel dated January 28, 1987 until the disposition of this motion to reissue the mandate. Further, Respondent-Appellant specifically asks that this Court reissue the mandate instanter so as to reaffirm the finality of this Court's previous final judgment in this case requiring that Petitioner-Appellee be resentenced.

Alternatively, should this Court determine that this motion should be denied, Respondent-Appellant respectfully submits that as this Court and its jurisdiction are creatures of statutory enactment, this Court clearly specify that statutory provision which confers upon this Court the authority to *sua sponte* recall a mandate some six months after it has been made the final judgment of the district court.

Respectfully submitted,

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Attorney General

MARION O. GORDON 302300
First Assistant Attorney General

/s/ William B. Hill, Jr.
WILLIAM B. HILL, JR. 354725
Senior Assistant Attorney General

/s/ Susan V. Boleyn 065850
Senior Assistant Attorney General

Please serve:

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Motion, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Mr. Paul H. Kehir
P.O. Box 346
Snellville, Georgia 30278

William A. Foster, III
District Attorney
Paulding County Courthouse
Dallas, Georgia 30132

This 10th day of February, 1987.

/s/ Susan V. Boleyn
SUSAN V. BOLEYN
Senior Assistant
Attorney General

## APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 84-8327

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CHARLIE BENSON BOWEN,

Petitioner-Appellee,

versus

RALPH KEMP, Warden, Georgia Diagnostic and Classification Center,

Respondent-Appellant.

(Filed May 11, 1987)

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On Appeal from the United States District Court for the Northern District of Georgia

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Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

BY THE COURT:

The motion of appellant, Ralph Kemp, to reissue the mandate which was previously recalled *sua sponte* by order of the court dated January 28, 1987 is CARRIED WITH THE CASE.

**APPENDIX H**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 84-8327

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CHARLIE BENSON BOWEN,

Petitioner/Appellee,

versus

RALPH KEMP, Warden, Georgia Diagnostic and Classification Center,

Respondent-Appellant.

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No. 84-8342

---

HORACE WILLIAM DIX,

Petitioner-Appellee,
Cross-Appellant,

versus

RALPH KEMP, Warden, Georgia State Prison,

Respondent-Appellant,
Cross-Appellee.

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Appeals from the United States District Court
For the Northern District of Georgia

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(October 22, 1987)

Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

VANCE, Circuit Judge:

These cases present the question whether by raising an insanity defense, a defendant places intent at issue so that under this court's decision in *Davis v. Kemp*, 752 F.2d 1515 (11th Cir.) (en banc), *cert. denied*, — U.S. —, 105 S. Ct. 2689 (1985), a *Sandstrom*[1] error cannot be harmless.

In *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), a divided panel of this court reversed the district court's holding that a *Sandstrom* error was not harmless. The majority held that once the jury had rejected the defendant's insanity defense, intent was no longer at issue and that the *Sandstrom* error was harmless.[2] In *Dix v. Kemp*, 804 F.2d 618, *vacated*, 809 F.2d 1487 (11th Cir. 1986), another panel of this court reversed the district court's holding that a *Sandstrom* error was harmless. The Dix panel held that when the defendant raised an insanity defense, the *Sandstrom* error was not harmless on the ground that intent was not at issue. We accepted both cases for en banc consideration to resolve this conflict. We now follow the panel's decision in *Dix*, and hold that when a criminal defendant raises an insanity defense, a *Sandstrom* error ordinarily cannot be harmless on the grounds that intent is not at issue.

I.

To assist jurors in the difficult task of determining what a defendant intended during the commission of a crime, some courts have instructed jurors that "the law presumes that a person intends the ordinary consequences of his acts," *see, e.g., Sandstrom*, 442 U.S. at 513, or that

"acts of a person of sound mind and discretion are presumed to be the product of the person's will." *See, e.g., Francis v. Franklin,* — U.S. —, 105 S. Ct. 1965, 1969-70 (1985); *Davis,* 752 F.2d at 1517.

In *Sandstrom* and again in *Franklin,* the Supreme Court held that such instructions unconstitutionally shifted the burden of persuasion from the government to the defendant on the issue of intent.[3] *Sandstrom,* 442 U.S. at 524, *Franklin,* — U.S. at —, 105 S. Ct. at 1977. The Due Process Clause of the Fourteenth Amendment protects against the conviction of an accused except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *Franklin,* — U.S. at —, 105 S. Ct. at 1970; *In re Winship,* 397 U.S. 358, 364 (1970). A *Sandstrom* error in the jury instruction thus "remove[s] from the prosecution the burden of proving every element of the crime beyond a reasonable doubt." *Davis,* 752 F.2d at 1517.

For several years, the Supreme Court declined to resolve the issue of whether a *Sandstrom* error can be harmless under *Chapman v. California,* 386 U.S. 18 (1967). *See Davis v. Kemp,* — U.S. —, 105 S. Ct. 2689, 2690-91 (1985) (White, J., dissenting from denial of certiorari); *Franklin,* — U.S. at —, 105 S. Ct. at 1977; *Sandstrom,* 442 U.S. at 526-27; *Thomas v. Kemp,* 766 F.2d 452, 455 (11th Cir. 1985), *vacated* and *remanded for further consideration,* 106 S. Ct. 3325 (1986).[4] In *Connecticut v. Johnson,* 460 U.S. 73 (1983), four justices of the Supreme Court suggested that the harmless error doctrine may never be applicable to a *Sandstrom* error. *Id.* at 85-87;

*Davis*, 752 F.2d at 1520. The Court did not resolve the issue, however, until three years later.

In *Rose v. Clark*, — U.S. —, 106 S. Ct. 3101 (1986), the Supreme Court held that the harmless error standard of *Chapman*,[5] did in fact apply to jury instructions that violated *Sandstrom* and *Franklin*. In applying harmless error analysis to *Sandstrom* violations, this court has identified two situations where the harmless error doctrine can be invoked: (1) where the erroneous instruction was applied to an element of the crime that was not at issue in the trial, or (2) where the evidence as to defendant's guilt was overwhelming. *See Davis*, 752 F.2d at 1521.[6] *See also Miller v. Norvell*, 775 F.2d 1572, 1576 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1995 (1986); *Thomas*, 766 F.2d at 455; *Tucker v. Kemp*, 762 F.2d 1496, 1501 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 3340 (1986); *Brooks v. Kemp*, 762 F.2d 1383, 1390 (11th Cir. 1985) (en banc), *vacated* and *remanded for further consideration*, 106 S. Ct. 3325 (1986).[7] The first situation arises when, for example, the only contested issue at trial is the identity of the defendant, and the *Sandstrom* error occurs in the instruction on intent. *See, e.g., Davis*, 752 F.2d at 1521. In such a case, intent is not at issue, and a *Sandstrom* error in the intent instruction may be harmless. *See id. Cf. Thomas*, 766 F.2d at 456 (where issue of intent is squarely presented to the jury, *Sandstrom* error cannot be harmless).

## II.

The issue now before us concerns primarily the first type of *Sandstrom* harmless error situation; namely, whether raising an insanity defense places intent at issue

such that the harmless error doctrine cannot be invoked. It is on this narrow issue that two panels of this court reached differing results.

Defendant Bowen was convicted in Polk County, Georgia of rape and murder,[8] and sentenced to life imprisonment for rape and to death for murder. In *Bowen,* 769 F.2d 672 (11th Cir. 1985), a panel of this court reversed the district court's ruling that the *Sandstrom* error was not harmless. The *Bowen* panel agreed with defendant's claim that the Georgia trial court's jury instruction, which was virtually identical to the instruction in *Franklin,* unconstitutionally shifted the burden of proof on intent, in violation of *Sandstrom.*[9] *Id.* at 675. The *Bowen* majority, however, held that the *Sandstrom* error was harmless under *Davis,* because even though the defendant raised an insanity defense, intent was no longer at issue once the jury rejected the defense. *See id.* at 676-78.

Defendant Dix was convicted of murder in Clayton County, Georgia and was sentenced to death.[10] In *Dix,* 804 F.2d 618 (11th Cir. 1986), a panel of this court reversed the district court's denial of habeas relief. The unanimous panel found not only that the Georgia superior court's jury instruction violated *Sandstrom,* but also that the error could not be harmless error under *Rose v. Clark* and *Davis,* because by raising an insanity defense, the defendant placed intent at issue. The *Dix* panel noted that there were conflicting precedents on this issue, making en banc consideration by this court appropriate. 804 F.2d at 621.

III.

The jury instructions in both *Bowen* and *Dix* clearly violated *Sandstrom* and *Franklin*, and we agree with both panels that the instructions were unconstitutional. *See Bowen*, 769 F.2d at 675-76; *Dix*, 804 F.2d at 620. The *Bowen* panel, however, held that the *Sandstrom* error in Bowen's jury instruction was harmless error under *Davis*. *See Bowen*, 769 F.2d at 676-78. The *Bowen* majority reasoned that even though the defendant pleaded insanity as a defense, once the jury rejected this defense, intent was no longer at issue. *Id.* at 676-77. Therefore, the majority concluded, "it could not be gainsaid that [defendant's] acts were anything but intentional." *Id.* at 677.

The problem with this analysis is that even if the defendant fails to prove his insanity defense, intent ordinarily remains an issue at trial. Although there may be a theoretical bright line between legal insanity and legal sanity, the reality is that the line is often quite blurred. When a criminal defendant in Georgia pleads the affirmative defense of insanity he assumes the difficult burden of proving by a preponderance of the evidence either (1) that he did not have the mental capacity to distinguish between right and wrong, Ga. Code Ann. § 16-3-2 (1984), or (2) that he acted as he did because of a delusional compulsion, *Id.* § 16-3-3. *Adams v. State*, 330 S.E.2d 869 872 (Ga. 1985). The jury's rejection of his plea does not mean it found that the defendant was totally free of mental infirmity or that his capacity to formulate a specific intent was the same as that of a normal or average person. The prosecution must still prove beyond a reasonable doubt that the defendant formed the intent necessary to convict

him of murder. As the *Dix* panel noted, "a reasonable jury might have rejected the argument that [the defendant] was insane, while still finding that the state failed to prove that [the defendant] possessed the requisite intent for malice murder." *Dix,* 804 F.2d at 622. The defendant's burden of proving insanity as a defense, does not impose the burden of proving lack of the required intent. This burden falls upon the state, and must be proved, along with all other elements of the crime charged, beyond a reasonable doubt. *Bowen,* 769 F.2d at 690 (Johnson, J., specially concurring in part and dissenting in part).[11]

The analogy to non-involvement cases is inapposite. When the only defense is that the accused was not the individual who committed the crime charged, then it can well be that intent is not at issue. In these cases, where "whoever killed the victim did so with intent and malice," *Davis,* 752 F.2d at 1521, a *Sandstrom* error on the issue of intent can be harmless. *See Tucker v. Kemp,* 762 F.2d at 1501 (defendant's sole defense was non-participation); *McCleskey v. Kemp,* 753 F.2d 877, 901-04 (11th Cir. 1985) (en banc), *aff'd on other grounds,* 107 S. Ct. 1756 (1987);[12] *Davis,* 752 F.2d at 1521. *Bowen* and *Dix* involve entirely different circumstances. Even though the juries found that the defendants failed to prove their insanity defenses by a preponderance of the evidence, the issue of intent was not conceded and the juries' findings did not relieve the state of its burden of proving the intent element of the crime.[13]

The *Sandstrom* error in Bowen's trial, therefore, cannot be harmless on the grounds that intent was not an

issue. The district court held that the *Sandstrom* error was not harmless, but the *Bowen* panel reversed on the grounds that intent was not at issue. Because we disagree with the panel on this issue, we affirm the district court's original holding.

Focusing on the issue of intent under the *Davis* harmless error test, the *Bowen* panel majority also held that the evidence as to Bowen's guilt was overwhelming. 769 F.2d at 676. The majority correctly stated that in deciding whether the evidence was overwhelming as to defendant's guilt, the "crucial inquiry relates to whether or not there is overwhelming evidence of intent." *Davis,* 752 F.2d at 1521 n.10, citing *Connecticut v. Johnson,* 460 U.S. 73, 86 (plurality opinion), 460 U.S. at 97 n.5 (1983) (Powell, J. dissenting). *See Miller,* 775 F.2d at 1576. The panel majority, however, incorrectly applied this rule to Bowen's case.

In finding that the evidence of Bowen's intent to kill was overwhelming, the majority relied on *Davis* and the other non-involvement cases to hold that the victim's death "obviously was not the result of accident, mistake, or negligence, but rather was the result of an 'intentional' act." *Bowen,* 769 F.2d at 676. In these cases, however, intent was not a contested issue, *see Davis,* 752 F.2d at 1521, and the court could find overwhelming evidence of that intent directly from the facts surrounding the crime.

When intent is at issue, however, we cannot infer overwhelming evidence of intent directly free from the physical sequence that resulted in the victim's death. We must also look at the evidence of defendant's state of mind. There was substantial evidence at trial that Bowen, though

not insane, may have lacked the intent required for murder. There was ambiguity in Bowen's conduct, and there was conflicting expert testimony on his state of mind at the time of the crime.[14] Under these circumstances, the *Sandstrom* error cannot be harmless on the overwhelming evidence ground.

The district court's holding on the *Sandstrom* issue must therefore be affirmed, with instructions to grant the writ of habeas corpus unless the state affords Bowen a new trial.

IV.

Following the Supreme Court's recent directive in *Rose v. Clark*, the *Dix* panel applied harmless error analysis to the *Sandstrom* errors. The panel held that the *Sandstrom* error at Dix's trial was not harmless, and reversed the district court. Because we hold that intent ordinarily is at issue when the defendant raises an insanity defense, and that it was in the Dix trial, we agree with the *Dix* panel that the *Sandstrom* error at Dix's trial was not harmless. The district court's denial of habeas corpus relief on the *Sandstrom* issue must therefore be reversed, and the case remanded with instructions to grant the writ of habeas corpus, unless the state afford Dix a new trial.

No. 84-8327. AFFIRMED.

No. 84-8342. REVERSED and REMANDED with instruction.

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FOOTNOTES

1 *Sandstrom v. Montana*, 442 U.S. 510 (1979).

2 The panel affirmed the grant of a new sentencing trial because Bowen had been sentenced to death by a jury drawn from

a list which unconstitutionally excluded women. In view of the result we now reach, it is not necessary that the court *en banc* consider that claim and Bowen's claim of prosecutorial misconduct. Parts III and IV of the *Bowen* panel opinion are reinstated.

[3] The Court in *Franklin* held that jury instructions that are unconstitutional under *Sandstrom* are not cured by the appendage in the instruction that the presumptions "may be rebutted." *See Franklin,* 105 S. Ct. at 1972-73. The *Franklin* court further held that earlier portions of the jury charge which instruct the jurors that the defendant is presumed innocent, and that the state is required to prove every element of the offense beyond a reasonable doubt, do not "dissipate" the *Sandstrom* error. *Id.* at 1973-74.

[4] The Supreme Court vacated and remanded *Thomas* for reconsideration in light of its recent decision in *Rose v. Clark,* 106 S. Ct. 3101 (1986). This court in *Thomas v. Kemp,* 800 F.2d 1024 (11th Cir. 1986), reviewed the record in light of *Rose* and held that the *Sandstrom* error was not harmless.

[5] The harmless error doctrine in *Chapman* requires that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. 18, 24 (1967).

[6] *Davis* was decided before the Supreme Court explicitly held in *Rose* that the *Chapman* harmless error doctrine applied to *Sandstrom violations.* However, the court in *Davis* applied harmless error analysis to the *Sandstrom* claim, under then-existing precedent. *See Davis,* 752 F.2d at 1520-21.

[7] The Supreme Court vacated and remanded *Brooks* for reconsideration in light of *Rose.* This Court in *Brooks v. Kemp,* 809 F.2d 700 (11th Cir. 1986) (*en banc*), concluded that harmless error analysis conducted by the en banc court in its previous opinion followed the harmless error doctrine of *Chapman* and *Rose. Id.* at 700-01.

[8] For a complete discussion of the facts and the procedural history of Bowen's case, see *Bowen v. State,* 241 Ga. 492, 246 S.E. 2d 322 (1978); *Bowen v. Kemp,* 769 F.2d 672, 675 (11th Cir. 1985).

[9] The instruction read:

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will but the presumption may be rebutted. A person of sound mind and

discretion is presumed to intend the natural and probable consequences of his act but the presumption may be rebutted.

10 For a complete discussion of the facts and the procedural history of Dix's case, see *Dix v. Kemp*, 804 F.2d 618, 619 (11th Cir. 1986).

11 As the panel in *Dix* explained:

> The *Bowen* decision implies that an insanity defense and a "lack of criminal intent" defense are inseparable, and that the rejection of the former implies the rejection of the latter. However, although an insanity defense consists of evidence tending to negate the existence of criminal intent, *Thomas*, 766 F.2d at 456, the two defenses are not the same. Where a defendant offers evidence tending to show he was insane, a jury might find that the defendant was sane and therefore criminally responsible for his acts, while at the same time finding that the state failed to prove that the defendant had the requisite intent for the crime charged.

*Dix*, 824 F.2d at 622.

12 In holding that the defendant conceded the issue of intent by asserting an alibi defense, the en banc court in *McCleskey* added:

> In so holding, we do not imply that whenever a defendant raises a defense of alibi a *Sandstrom* violation on an intent or malice instruction is automatically rendered harmless error. Nor do we suggest that defendant must specifically argue that intent did not exist in order for the issue of intent to remain before the jury. But where the State has presented overwhelming evidence of an intentional killing and where the defendant raises a defense of nonparticipation in the crime rather than lack of *mens rea*, a *Sandstrom* violation on an intent instruction such as the one at issue here is harmless beyond a reasonable doubt.

753 F.2d at 904 (citations omitted). Thus even in non-involvement cases, intent may still remain at issue, and a *Sandstrom* error may not be harmless.

13 The Bowen panel majority found support for its holding in the language of Justice Blackmun's opinion for a plurality of the Supreme Court in *Connecticut v. Johnson*, 460 U.S. 83, 87 (1983):

> In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the er-

roneous instruction as to the appellate court to consider the error harmless.

By holding today that a defendant ordinarily places intent at issue by pleading an insanity defense, we do not foreclose the possibility that in "rare situations," *id.*, a defendant in presenting an insanity defense may "admit that the act alleged by the prosecution was intentional." *See, e.g., Cook v. Foltz*, 814 F.2d 1109, 1113 (6th Cir. 1987). The Supreme Court explicitly left it "to the lower courts to determine whether, by raising a particular defense or by his other actions, a defendant himself has taken the issue of intent away from the jury." 460 U.S. at 87.

[14] There was testimony that Bowen was extremely depressed, could not remember whom he had attacked, and eventually turned himself in to a mental hospital. The expert testimony at trial established that Bowen was suffering from some form of mental disorder, but was inconclusive as to his state of mind at the time of the incident. There was a legitimate jury issue as to Bowen's state of mind.

RONEY, Chief Judge, concurring in part and dissenting in part:

I agree that an insanity defense does not subsume the proof of intent required to convict of a capital offense. Neither does the assertion of an insanity defense, lost before the jury, mean that a habeas corpus court should not deny relief on a *Sandstrom* error when that error is harmless because of overwhelming evidence as to intent. *See Rose v. Clark*, — U.S. —, 106 S.Ct. 3101 (1986).

Applying these principles, I concur in the result reached by the court in Dix. I dissent from the result reached in Bowen on this issue, on the ground that any *Sandstrom* error was harmless beyond a reasonable doubt.

I concur in both Judge Fay's opinion and Judge Edmondson's opinion, except as to the conclusion in Dix.

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HILL, Circuit Judge, dissenting:

The majority's holding in these two cases leads us farther down a path I find most unattractive. We are at or near the point where The Great Writ automatically issues any time a trial judge is found to have instructed a jury that intention can be presumed from a person's acts. I respectfully dissent.

As the majority opinion relates on page 3, *Sandstrom/Franklin* violation instructions have, over the years, taken two forms. One, condemned in *Sandstrom* commences, "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 513. The

other, found in *Franklin,* includes "acts of a person of sound mind and discretion are presumed to be the product of the person's will." — U.S. at —, 105 S. Ct. at 1970.

Both versions are incorrect abstract statements of the law. The *Sandstrom* version results in a shift of the burden as to any person who is a defendant. The *Franklin* version, however, applies only to defendants who are of sound mind and discretion.

"Sound mind" is defined as "[t]he normal condition of the human mind,—that state in which its faculties of perception and judgment are ordinarily well-developed, and not impaired by mania, insanity, or other mental disorder." Black's Law Dictionary at 1251 (5th ed. 1979). I do not believe that a person could, at once, be of sound mind and yet be suffering from such a mental defect or deficiency that he could not form intent to commit murder.

In these (*Bowen/Dix*) cases the *Sandstrom* instruction was not given. In both cases, the *Franklin*— ". . . person of sound mind and discretion . . ." version was given.

My review of the record in *Sandstrom,* as it existed before the United States Supreme Court, discloses that the trial judge's instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," 442 U.S. at 513, was the only statement by the trial judge on this subject. The holding in *Sandstrom* has made its way through cases involving instructions incorporating the presumption but far more circumscribed than the instruction given in *Sandstrom; Franklin* is a good example of this expansion. Until today, though, I know of

no holding that the mere incantation of the presumption, directed toward a particular defendant, would spoil a conviction of one to whom it specifically does not apply.

In *Bowen* and *Dix,* there was a question of mental soundness of each defendant. The trial judge in each case, apparently aware of and sensitive to this issue, limited the instruction so that the jury could apply it only if it first found each defendant to be "of sound mind." The instruction in each case was as follows:

> The acts of a person *of sound mind and discretion* are presumed to be the product of the person's will but the presumption may be rebutted. A person *of sound mind and discretion* is presumed to intend the natural and probable consequences of his act but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the tryor [sic] of facts, that is you the jury, may find such intention upon the consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted.

*Bowen,* 769 F.2d at 675 (emphasis supplied).

"I charge you that the acts of a person *of sound mind and discretion* are presumed to be the product of a person's will. But, this presumption may be rebutted. . . ." "A person will not be presumed to act with criminal intention." *Dix,* 804 F.2d at 619-20 n.1 (emphasis supplied).

Had either of the two defendants been found not to be of sound mind, that defendant's trial would not be in any sense affected by the presumption of intent. Thus, in the event of a finding of unsound mind, no constitutional error appears.

On the other hand, in each case, if the defendant were found to be of sound mind, the instruction condemned in *Sandstrom* and *Franklin* would apply and our only task would be to ascertain whether, under *Rose v. Clark,* — U.S. —, 106 S. Ct. 3101 (1986), the instruction was harmless error. In my view, in each of these cases, the evidence is overwhelming that a person of sound mind committing these crimes did so intentionally. The finding of intent would not have been influenced by the incorrectness of the instruction. Therefore, as applied to persons of sound mind, the instruction was harmless.

In sum, there was no erroneous instruction given to be applied by the jury to one of unsound mind, and the instruction was harmless insofar as it applied to one of sound mind. There is no reason for the grant of the writ of habeas corpus to undercut the conviction and sentence of either of these appellants.

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FAY, Circuit Judge, dissenting in part and concurring in part, in which EDMONDSON, Circuit Judge joins; RONEY, Chief Judge, joining in part:

Most respectfully, I dissent from portions of the majority opinion while agreeing with others. It seems to me that it is rather important to note at the outset what the majority does not hold. The majority opinion does not adopt the *per se* rule announced by the panel opinion in *Dix* that "where the defendant raises an insanity defense, a *Sandstrom* error on this issue of intent cannot be harmless on the grounds that intent was not at issue." 804 F.2d at 621, *vacated;* 809 F.2d 1487 (11th Cir. 1986). Rather, the majority holds that, "when a criminal defendant raises an insanity defense, a *Sandstrom* error *ordi-*

*narily* cannot be harmless on the grounds that intent is not at issue." (emphasis added) I agree. This language is supplemented by footnote 13 which points out that there may be "rare situations" when a defendant would raise an insanity defense but nevertheless "admit that the act alleged by the prosecution was intentional." I agree.

Because I cannot imagine a better illustration of just such a case than *Bowen v. Kemp*, I dissent from the granting of relief based upon the *Sandstrom* error. Charles Bowen confessed to stabbing his twelve year old female victim in the back as she was trying to run away after he had raped her. When she turned around he stabbed her in the chest. Bowen stated that the victim told him to go ahead and finish her off. Thereafter he stabbed her repeatedly twelve or fourteen times! Hardly unintentional acts.

Defense counsel decided that the only course to pursue was insanity. Although not successful, it appears to have been a very sound and reasonable decision. That's all the *Bowen* trial was about. Experts testified and the jury concluded that Bowen did have the mental capacity to distinguish between right and wrong and that he was not acting under any delusional compulsion. The jury found him sane and sentenced accordingly. In my opinion this case is the "rare situation" described in footnote 13. The defense in *Bowen* conceded that the act of killing was intentional. There was no issue in that regard for the jury to resolve.

Two other aspects of the majority opinion require comment.

In Section III it is stated that, "The jury's rejection of his plea does not mean it found that the defendant was totally free of mental infirmity or that his capacity to formulate a specific intent was the same as that of a *normal* or *average* person." (emphasis added). Although it seems to me that the use of the words "normal" and "average" might create serious confusion, understanding of the thought being expressed is important. There is no legal requirement that a defendant be found to be normal or average before he or she can be found guilty of murder. The only requirement is that the defendant possessed the necessary criminal intent. Certainly such could be found to exist in persons considered abnormal or found to be below average in intelligence. The majority opinion does not hold otherwise.

Also in Section III of the majority opinion we find the statement, "When intent is at issue, however, we cannot infer overwhelming evidence of intent directly from the physical sequence that resulted in the victim's death." Although startling as an independent proposition, I do not read this as abolishing the ageless truism that "actions speak louder than words." Certainly courts must consider all of the evidence presented in each case but I know of nothing more probative, in any trial, than evidence relating to the conduct of the parties. To suggest that there is "ambiguity in Bowen's conduct" is simply contrary to this record as I read it. A man, found to be sane, stabbed a twelve year old female fourteen times throughout her back, chest and neck. Reasonable persons could certainly conclude that such action was intended to result in death. The jury's verdict in this regard should be upheld. Al-

though agreeing with much of the majority opinion, as I understand it, I would conclude that the *Sandstrom* errors in both the Bowen and Dix trials were harmless beyond reasonable doubt.

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EDMONDSON, Circuit Judge, concurring in part and dissenting in part, in which HILL and FAY, Circuit Judges, join; RONEY, Chief Judge, joining in part:

I agree that just by asserting the defense of insanity, a defendant in a murder case does not automatically concede intent to kill. The question of intent remains in issue, and the State has the burden to prove intent. A *Sandstrom* error may still be harmless, however. I dissent from today's court's opinion in both *Dix* and *Bowen* because the evidence of intent is overwhelming. *See generally Rose v. Clark*, — U.S. —, 106 S.Ct. 3101 (1986) (although defendant claimed he was either insane or incapable of forming the requisite criminal intent, *Sandstrom* error still could be harmless).

In these cases, the juries rejected the insanity defense. I think no rational jury would conclude that a sane person who did the evil things that Dix (torture and repeated stabbings) and Bowen (rape and repeated stabbings) did to their victims lacked the intent to kill. "[I]t would defy common sense to conclude that an execution-style killing or a violent torture-murder was unintentional." *Rose*, 106 S.Ct. at 3108, n.10. Whatever errors were in the jury instructions concerning intent in the *Dix* and *Bowen* trials were harmless beyond a reasonable doubt.

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